

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT A,

v.

TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT and THE KEEGAN ACADEMY.

OAH CASE NO. 2012080512

PARENTS ON BEHALF OF STUDENT B,

v.

TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT and THE KEEGAN ACADEMY.

OAH CASE NO. 2012080514

**DECISION ON CONSOLIDATED CASES**

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH), State of California, heard these matters in Temecula, California, on October 22, 24, and 25, 2012, and November 13, 14, 15, 16, 26, 27, and 28, 2012.

Attorney Margaret Adams represented Student A and Student B (collectively referred to in this Decision as Students or, sometimes, the boys). Eric Austin, a law clerk for Ms. Adams, attended the hearing on many days. Students' mother (Mother) attended the hearing every day. Students' father attended the first three days of the hearing. Students' stepfather (Stepfather) attended the first day of the hearing (Mother and Stepfather are referred to collectively as "Parents" since they are the two parents most involved with the issues in these cases). Students were not in attendance on any of the hearing days.

Attorney Sarah Sutherland of the law firm Dannis Woliver Kelley represented the Temecula Valley Unified School District (Temecula) and the Keegan Academy (Keegan)<sup>1</sup>

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<sup>1</sup> As will be discussed below, Keegan is a charter school of Temecula. Temecula is the local education agency for Keegan. It is unclear why Keegan was named as a separate and distinct party to these actions. However, neither Keegan nor Temecula moved to dismiss Keegan as a party and both have appeared jointly and separately and defended against the

(collectively referred to as the Districts). Keegan is a charter school chartered by Temecula. Ms. Sutherland was accompanied each day by her colleague, attorney Emily Hirsekorn. Attorney Megan Moore of the law firm Middleton, Young, & Minney, LLP, appeared on behalf of Keegan for most of the hearing days. Her colleague Sarah Bancroft appeared on behalf of Keegan on the day Ms. Moore was not present. Ms. Hirsekorn, Ms. Moore and Ms. Bancroft did not take part in examination of any of the witnesses at hearing.

Sonja Clause, School Principal for Keegan, was present for each hearing day on behalf of Keegan. Kimberly Velez, Temecula's Director of Special Education, was present for the first three days of hearing on behalf of Temecula. Melanie Hertig, an Assistant Director for Special Education for Temecula, was present for Temecula during all hearing days in November.

## PROCEDURAL ISSUES IN THIS CASE

### *Motion to Consolidate*

On August 17, 2012, Parents on behalf of Student A filed a request for due process hearing (complaint) in OAH case number 2012080512, (First Case), naming Temecula and Keegan as respondents. Also on August 17, 2012, Parents on behalf of Student B filed a complaint in OAH case number 2012080514 (Second Case), naming Temecula and Keegan as respondents.

Student A and Student B are twin brothers. Their respective complaints alleged procedural and substantive due process violations against Keegan and Temecula with regard to school years 2010-2011, 2011-2012, and 2012-2013. The complaints in the First Case and the Second Case are almost identical, with the exception of a few words.

The parties filed separate joint requests for continuance in both cases on September 26, 2012. In separate orders issued on September 27, 2012, OAH granted both motions for continuance.

The due process hearing in Student A's case began as scheduled on October 22, 2012. The hearing in Student B's case was scheduled to start on November 13, 2012. At the prehearing conference held on October 15, 2012, in Student B's case, the parties discussed the possibility of consolidating the two cases. However, the parties did not file a motion to do so prior to the start of the hearing in Student A's case on October 22, 2012.

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allegations brought by Students. When the ALJ queried the parties at the beginning of the hearing the reasons for Keegan's participation as a separately named respondent, the parties responded that they had no objection. Therefore, although Keegan is not a local education agency, for purposes of this Decision and for ease of identification of the parties, the ALJ has referred to Keegan collectively with Temecula as one of the "Districts."

On October 25, 2012, at the beginning of the third day of hearing in the First Case, the parties conferred about scheduling issues in both cases. After conferring, the parties made a joint oral motion to consolidate Student A's case with Student B's case. The parties requested a continuance of the proceedings so that the consolidated hearing would begin on November 13, 2012, the date already scheduled for the hearing in the Second Case.

Generally the consolidation of cases involving different petitioning students, even those who are siblings, would be disfavored given the individual nature of the claims presented. However, in the instant case, all parties agreed that the procedural allegations raised in each complaint were basically identical. The Students' respective IEP meetings were held on the same days and are therefore dated the same. Additionally, all parties agreed that the substantive issues raised in the Students' respective complaints were nearly indistinguishable because Student A and Student B have almost identical disabilities and special education needs. The issues raised for hearing in the prehearing conference statements of both Students were identical except for their respective names. The parties stated that the witnesses, evidence, and testimony in each case would be almost identical, and that it would be a waste of resources to have separate proceedings where the second case would effectively duplicate the first.

After due consideration, in light of the unique nature of the cases, the agreement of the parties that the cases raised almost identical procedural and substantive issues, and in the furtherance of judicial economy, the ALJ granted the parties' joint motion to consolidate on October 26, 2012. The ALJ also granted the parties' motion to continue the consolidated hearing. The ALJ indicated that the 45-day timeline for issuance of the decision in the consolidated cases would be based on the date of the filing of both complaints since the complaints were filed on the same day and the parties' motions for continuance in each case were granted on the same day. The ALJ also indicated that testimony already taken in Student A's case would be considered as part of the hearing testimony in the consolidated matter.

#### *Motions to Continue*

The consolidated hearing started as scheduled on November 13, 2012. At the conclusion of the hearing on November 28, 2012, the ALJ granted the parties' request for a continuance in order for them to file written closing briefs. Briefs were scheduled to be filed no later than December 19, 2012. However, there were evidentiary issues that remained outstanding. The parties were unable to resolve the issues prior to the date their briefs were due. On December 17, 2012, Students filed a motion to admit evidence and a request for a status conference. The ALJ convened a telephonic status conference with the parties on December 19, 2012. At that time, Students requested a one-week continuance in order to resolve the evidentiary issues. The Districts did not oppose the motion to continue, which the ALJ granted during the status conference. On December 21, 2012, the parties filed a joint motion to continue the filing date for their closing briefs for an additional week based on their need to incorporate information from an evidentiary stipulation into their briefs. The

ALJ granted their motion on December 26, 2012. The parties timely filed their written closing briefs on January 3, 2013.

### *Evidentiary Issues*

#### *Request for Official Notice*

On December 12, 2012, the Districts filed a request that the ALJ take official notice of Brandman University's Education Course Catalogue for the 2006-2007 academic school year. The Districts request notice pursuant to Evidence Code section 452, subdivision (h), which permits official notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." The course descriptions are found on the Brandman University website. Brandman University is part of the Chapman University system. The Districts argue that the information is relevant because it describes a course taken by Students' mother while she was obtaining her general education teaching credential. The Districts contend that the course description contradicts Mother's testimony regarding the scope of her knowledge of special education procedures.

Students object to the request for official notice on several grounds. Students contend that the Districts have provided no evidence that the course is the same one taken by Mother. By way of declaration in support of Students' opposition, Mother testifies that Brandman University did not become part of Chapman University until two years after she attended Chapman. Mother also states that the course she took concerned the philosophy of co-teaching with a special education teachers rather than the legal requirements of the IEP process.

The fact that the Districts' motion creates a factual dispute emphasizes the inadvisability of attempts by parties to offer evidence subsequent to the close of a hearing unless by stipulation of the parties. Here, Mother disputes that the course she took was the course described in the course offering. Further, even assuming that the course descriptions are the same, the Districts present no evidence that the instructor actually presented or reviewed every topic listed during the class Mother attended. In upholding an ALJ's decision to deny a similar request for official notice, the court in *J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 440 (*Fresno*), pointed out that "[A]lthough the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its *proper interpretation are not subject to judicial notice* if those matters are reasonably disputable." (citing to *Unruh-Haxton v. Regents of the University of California* (2008) 162 Cal.App.4th 343, 364 (citations omitted) (*italics in original*).)

Here, Students dispute that the course Mother took is the same as the one listed in the catalogue. Students also dispute the extent to which the material presented in class was similar to that listed in the course outline. The ALJ therefore agrees with Students that the relevance of the Brandman catalogue is tenuous given the factual dispute regarding the actual course content. The truth of whether the course material listed was actually taught in

Mother's class is also disputed. The information which the Districts submit for official notice therefore does not meet the criteria established under Evidence Code section 452, subdivision (h). The Districts' motion for official notice is denied.

#### *Motions to Admit Document Summaries*

On December 17, 2012, Students filed a motion to admit document summaries of Students' Exhibits S-59. On December 19, 2012, the ALJ held a telephonic status conference with the parties to discuss Students' motion. Based upon both parties' acknowledgment that the summaries were not fully accurate, the ALJ denied Students' motion but granted the parties' request for continuance to resolve evidentiary issues relating to the documents in question.

On December 21, 2012, the parties filed a stipulation in which they agreed to the admission of the Districts' Bates stamped pages D-563-D-609. The pages in question reflect the duration in hours of the language and speech and occupational therapy services provided to Students by Total Education Solutions (TES), the non-public agency (NPA) that provided special education and related services<sup>2</sup> to Students while they were enrolled at Keegan. The parties stipulated that Students' Exhibit V-59 and Districts' D-563-D-609 together represent all special education and related services provided to Students by TES in school years 2010-2011 and 2011-2012, including make-up services when sessions were missed. The parties further stipulated that the "unit" columns in these exhibits reflected the hours of services provided. The parties stipulated that pages 33-37 of Exhibit V-59 represent TES services provided to Students in April 2011. Finally, the parties stipulated to the withdrawal of Districts' exhibits D-4 and D-12, except to the extent covered by pages D-563-D-609.

On December 28, 2012, the Districts submitted the pages referenced in the parties' December 21, 2012 stipulation. The ALJ has marked and admitted this exhibit as Districts' Exhibit 109.

#### *Subsequent Motions to Admit Evidence*

On January 3, 2013, concurrent to the filing of their written closing argument, the Districts filed an additional motion to admit evidence. The Districts seek to admit documents concerning other hours of services provided to Students by TES, including some four hours of services provided during December 2010. Students filed an objection to the Districts' motion on January 8, 2013. Students argue that the exhibits in question have not been authenticated. Students also argue that the Districts failed to question any witness at hearing about the exhibits and therefore Students have had no opportunity to cross examine anyone regarding the content of the documents, particularly where information contained is

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<sup>2</sup> In California, related services are also called designated instructional services. The terms are used interchangeably here.

not legible. Students also assert that the documents are unnecessary because the information is contained elsewhere.

Students thereafter filed a motion to admit additional evidence regarding the qualifications of staff from the Lindamood-Bell agency that provided reading instruction to Students during the summer of 2011. Students offer that the information was subpoenaed by the Districts subsequent to the close of the hearing but never moved into evidence.

In both cases, the parties have moved to admit evidence subsequent to the submission of closing arguments. In both cases, the evidence which the parties move to admit raise questions of disputed facts or issues which the opposing party would have a right to address through examination of witnesses. Admitting the evidence at this late date denies each opposing party the opportunity to cross examine witnesses regarding the evidence and denies that party an opportunity to present rebuttal testimony or evidence.

The ALJ granted the parties two continuances to file written closing arguments specifically in order for them to resolve evidentiary questions regarding documents, in particular hours of services provided to Students. The parties have failed to fully come to agreement. These issues should have been resolved prior to the hearing when the parties exchanged documents, during the hearing, or, here, at least during the two weeks of continuance granted for the filing of closing briefs. The ALJ closed the record and submitted the case at the time the parties filed their closing briefs on January 3, 2013. Any attempt to offer additional evidence at this time is untimely. All motions made by any party on or after January 3, 2013, for the admission of additional evidence are therefore denied.

#### *Filing by the Parties of Rebuttal/ Reply Briefs*

As stated above, on December 26, 2012, the ALJ granted the parties' motion for an additional one-week continuance in order to file written closing briefs based upon the parties' representation that they were resolving evidentiary issues and would be jointly submitting evidence to that effect. The ALJ granted the parties until January 3, 2013, to file their briefs. The ALJ's order did not, however, grant either party the right to file rebuttal or reply briefs. The parties did not file any motion requesting permission to file rebuttal or reply briefs. Therefore, Students' rebuttal concerning service hours calculations, filed on January 8, 2013, and the Districts' reply to Students' closing brief, also filed on January 8, 2013, have not been considered for purposes of this Decision.

### ISSUES<sup>3</sup>

1. Did Temecula and Keegan deny Students a free appropriate public education (FAPE) during the 2010-2011 school year by:

a) Failing to implement Students' December 3, 2009 individualized education programs (IEP's) from August 23, 2010 through November 29, 2010, in the areas of specialized academic instruction, speech and language, and occupational therapy;

b) Failing to have one of Students' special education teachers and an appropriate local educational agency (LEA) representative at the IEP meetings convened on November 29, 2010, January 24, 2011, and February 3, 2011;

c) Failing to offer an appropriate IEP at the IEP meetings convened on November 29, 2010, and February 3, 2011, and in the May 25, 2011 IEP amendment, because those IEP's did not contain appropriate goals, an appropriate program or services, and an appropriate ESY program;

d) Deleting speech and language and occupational therapy services for extended school year (ESY) 2011 on May 25, 2011, without convening an IEP meeting; and,

e) Failing to materially implement the November 29, 2010, and February 3, 2011 IEP's in the areas of specialized academic instruction, speech and language, and occupational therapy?

2. Did Temecula and Keegan deny Students a FAPE during the 2011-2012 school year by:

a) Failing to materially implement the November 29, 2010 IEP's as amended on February 3, 2011, and the goals and services consented to by parents in Students' December 5, 2011 IEP's, as amended on December 14, 2011;

b) Failing to provide appropriate specialized academic instruction;

c) Failing to provide appropriate related services in speech and language and occupational therapy;

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<sup>3</sup> The issues as delineated in the Orders Following Prehearing Conference for Student A and Student B were phrased somewhat differently as the Orders were prepared by different ALJ's. However, the issues raised by Students in their respective complaints and prehearing conference statements are identical except for their names. The ALJ has therefore utilized the issues as stated in the Order Following Prehearing Conference in Student B's case as the issues for decision for both Students.

- d) Failing to timely offer or implement a program for ESY;
- e) Failing to timely convene an IEP team meeting to review Students' occupational therapy assessments;
- f) Failing to develop appropriate goals and services to address all of Students' unique needs;
- g) Failing to make a specific written offer of placement;
- h) Failing to include an appropriate LEA representative at the IEP meetings held May 30, 2012?

III Did Temecula and Keegan deny Students a FAPE during the 2012-2013 school years by:

- a) Failing to make an appropriate offer of placement; and
- b) Failing to have an IEP in place by the start of the 2012-2013 school year?

#### CONTENTIONS OF THE PARTIES

Students enrolled at Keegan Academy, a public charter school chartered by Temecula, at the beginning of the 2010-2011 school year. They contend that Keegan was aware that Students were children with significant special needs who had current IEP's providing Students with specialized academic instruction for the majority of the school day, along with related services in the areas of occupational therapy (OT) and speech and language (SL). Students contend that Keegan failed to implement Students' IEP's at all for the first six months Students attended Keegan and thereafter failed to materially implement instruction and related services provided in subsequent IEP's. Students contend that the IEP's subsequently developed for them by Keegan and Temecula did not sufficiently address their need for intensive special education instruction, failed to provide an adequate amount of related services, and failed to provide for appropriate extended school year services. Students contend that that SL services that were provided were also inadequate because the therapy was delivered through video conferencing by a speech and language pathologist assistant rather than by a licensed speech language pathologist (SLP).

Students further contend that the IEP's developed for them by the Districts were procedurally deficient because they did not include appropriate present levels of performance, did not include appropriate goals, and because legally required IEP team members did not attend all of the IEP meetings convened by the Districts. Students contend that Keegan, as a public charter school, was required to address their special education needs as is required by any public school. Students contend that the Districts' procedural and substantive violation of their rights under the Individuals with Disabilities Education Act



(IDEA) gave Students' parents no other alternative but to privately place Students at a Lindamood-Bell school (herein LMB or Lindamood-Bell) during the summer of 2011, and at a non-public school (NPS) that is designed to meet the needs of children with disabilities similar to those of Students, beginning the summer of 2012. Students contend that their inadequate speech and language services at Keegan forced their parents to provide Students with additional speech and language therapy.

As a remedy for the Districts' procedural and substantive violations, Students request that their parents be reimbursed for all out-of-pocket expenses to date for related services, LMB tuition, tuition at their NPS, and for transportation costs related to accessing these services. Students also request that the Districts be ordered to provide compensatory education to Students by funding their attendance at their NPS for the remainder of the 2012-2013 school year.

The Districts respond that they did not materially fail to implement Students' IEP's at any time during the two school years Students attended Keegan. They contend that to the extent that Keegan failed to implement Students' IEP's during the 2010-2011 school year, Keegan voluntarily provided sufficient compensatory instructional hours and related services to remedy any implementation failures. The Districts contend that all instruction and services provided to Students legally addressed their needs and that the IEP's the Districts developed for Students were legally adequate. The Districts contend that all IEP's offered to Students were procedurally and substantively adequate and that to the extent that there may have been technical procedural violations, none of the violations substantively denied Students a FAPE. Finally, the Districts contend that when they had had sufficient time to determine that Students were not benefitting from Keegan's unique educational model, they offered Students placement in a special day class program that would meet their needs. The Districts therefore maintain that they have offered a legally adequate FAPE to Students at all times and that Students should not prevail on any issue.

As affirmative defenses, the Districts assert that Students' parents chose to enroll Students in Keegan because of its unique educational model and cannot now claim that Keegan's model was inappropriate for them or did not meet their needs. The Districts contend that Student's Mother, who, as discussed further below, was Students' general education teacher for much of the time they attended Keegan, was aware Students were not receiving special education services for their first six months of attendance, but voluntarily chose to continue Students' enrollment at Keegan rather than returning Students to their previous public school. The Districts' overall argument is that they respected Parents' right to choose a charter school placement for Students and that the Districts are not responsible if Keegan ultimately was not an appropriate placement for them. The Districts allege that when they realized that Keegan was inappropriate, they offered an alternative program that would meet Students' needs.

However, the Districts also contend that once Students' IEP teams determined that Keegan was not an appropriate placement for Students, their school district of residence became responsible for Students' education. In this case, because Students' family had

moved outside the boundaries of the Temecula Unified School District, their new school district of residence was the responsible LEA rather than Temecula. The Districts therefore contend that Students are not entitled to the award of any remedies, at least from the time Students' IEP team determined that Keegan was not an appropriate placement for them. Finally, the Districts alternatively contend that Students' parents did not provide legally adequate notice of their intent to privately place Students at LMB or at their NPS and that Parents in fact dis-enrolled Students from Keegan prior to their enrollment at the NPS. The Districts therefore additionally assert that Students are not entitled to any of the requested remedies for any time after they moved outside of Temecula's boundaries.

### SUMMARY OF DECISION FINDINGS

This Decision finds that Keegan, as Students' charter school, and Temecula, as the LEA for Keegan, were responsible for complying with all aspects of the IDEA as they related to Students during the entire time Students were enrolled at Keegan. While the Districts are correct that there are inherent contradictions and conflicts between state law regarding residency and charter schools, and LEA obligations under the IDEA, those conflicts must be resolved in favor of the IDEA's requirements that children be provided with a FAPE even at charter schools voluntarily chosen by a child's parents.

This Decision further finds that the Districts materially failed to implement Students' IEP's during various times at issue in this case resulting in a denial of FAPE to Students, that the IEP's developed for Students for much of the two school years at issue were procedurally and substantively inadequate, and that Students' made only de minimus progress in academics and speech and language as a result of the Districts' failures to adequately address their special education needs.

However, as detailed below, this Decision also finds that Students have failed to meet their burden of proof on some of their allegations. The Decision specifically finds that Students have failed to meet their burden of proof that the placement offered to them by the Districts for the time period of December 2011 to June 2012, was legally inadequate.

The Decision therefore finds that Students have not prevailed on all their allegations. As discussed below, balancing the equities of this case, Students are therefore only entitled to a portion of the remedies they have requested.

### FACTUAL FINDINGS

#### *Students' Background and their Unique Needs*

1. Students are 12-year-old male twins. They lived within the boundaries of Temecula until around the time they began attending school at Keegan. Students live with Mother, Stepfather, and a stepsister. Mother and Stepfather have been the parents most involved with Student's education, at least within the time encompassed by this case.

2. Students were born prematurely at 28 weeks of gestation. Both weighed less than three pounds at birth. Both boys sustained bilateral intraventricular hemorrhages, also known as perinatal strokes, soon after birth. Following their birth, Students remained in intensive care for two months with breathing tubes, respirators, and feeding tubes. After two months in intensive care, Students were permitted to go home, but required oxygen, apnea monitors, breathing treatments, and medications. Students received breathing treatments for two to three years. Both wear glasses. While there are some differences in their personalities and minor differences in their general abilities, strengths and weaknesses, overall Students have similar cognitive abilities, communication deficits, and educational challenges.

3. The hemorrhages Students suffered have recently been found by both Districts' and Students' assessors to be one of the fundamental causes of Students' disabilities. Students have multiple disabilities that affect their ability to communicate, retain information, and learn. They have severe language delays, severe articulation delays, mild fluency and voice deficits, and moderate pragmatic language delays. Students have cognitive delays, although their nonverbal intelligence functioning is estimated to fall within the low average range. Students' very low scores on academic testing are much lower than expected, indicating that they suffer from learning disorders in reading and written expression and in mathematics. Students also have deficits in working memory and processing speed.

4. Temecula found Students eligible for special education and related services as soon as they started preschool. Their original eligibility category was speech and language impaired. At some point prior to enrolling at Keegan, Students' IEP teams changed their primary eligibility to specific learning disability (SLD) with a secondary eligibility of speech and language impaired. Subsequent to assessment by a TES psychologist in fall 2011, Students' IEP teams changed their primary eligibility classification to other health impaired (OHI) based upon the brain hemorrhages Students suffered in infancy, with specific learning disability as a secondary designation.

5. Students initially attended an in-home day care when they were preschool aged. When they were about four years old, Mother enrolled Students in Temecula so that they could receive special education services. Temecula placed them in a special day class (SDC) for preschool. Students also received speech and language therapy. When Students began Kindergarten, they were placed in a general education classroom, with pull-out<sup>4</sup> services for speech and language. Students had academic difficulties from the time they started Kindergarten. Halfway through the year, their IEP teams placed them in an SDC Kindergarten for part of their school day. Students repeated Kindergarten.

6. Temecula administered psycho-educational assessments to Students in December 2005. Student A's full scale intelligence quotient (IQ) on the Weschler

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<sup>4</sup> "Pull-out" services are those provided to students outside of their normal classroom setting. "Push-in" services are provided in the student's regular classroom.

Preschool and Primary Scale of Intelligence (WPPSI) was measured to be 73. Student B's full scale IQ on the WPPSI was 74. Both scores are considered "borderline." Temecula also administered a second cognitive assessment to Students called the Stanford Binet Intelligence scales for Early Childhood (Stanford Binet). Student A's overall IQ on this assessment was 69, in the second percentile. His verbal IQ score was a 62, in the first percentile, although his non-verbal IQ was 79, in the eighth percentile. Student B's overall IQ on the Stanford Binet was 68, placing him in the second percentile. Student B's verbal score on this test was 66, in the first percentile. However, like Student A, Student B's non-verbal score on the Stanford Binet was higher than his verbal score. Student B's nonverbal score was 74, which placed him in the fourth percentile on this subtest of the Stanford Binet.

7. Both boys scored a 91 on the Beery-Butenica Developmental Test of Visual-Motor Integration (VMI), which is in the average range. On the Bracken-Basic Concept Scale, Revised (Bracken), Student A scored a 74 on both the classification total test and in school readiness, which placed Student A in the fourth percentile for both sections of the assessment. Student B scored 69 on the classification total test, which placed him in the second percentile, and a 72 on the school readiness portion of the assessment, which placed Student B in the third percentile for that subtest of the Bracken. On the Vineland Adaptive Scales, completed by Mother, Students both obtained a composite score of 70, which placed them in the second percentile as compared to other children their age.

#### *December 2008 Assessments*

8. Students' December 2008 assessments and their December 2009 IEP's are not at issue in this case. However, as will be discussed below, assessments administered to Students in 2011 and 2012 and observations of Students' experts demonstrate that Students failed to make more than de minimus progress in a number of areas. Additionally, Students' November 29, 2010 IEP's were based upon the present levels described in Students' 2008 IEP's. It is therefore necessary to describe in some detail the results of Students' 2008 assessments as well as discuss their 2009 IEP's.

9. Temecula re-assessed Students in December 2008, when they were in second grade. To evaluate Students' cognitive abilities, Temecula administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV). The assessors were not able to obtain a verbal comprehension score for either boy. On the perceptual reasoning index, Students both scored 102, which is in the 55th percentile. On the working memory index, Students both scored a 52, which is less than the first percentile. On the processing speed index, Students both scored a 65, which is in the first percentile.

10. Temecula also administered the Brigance Comprehensive Inventory of Basic Skills-Revised (Brigance) to Students. In the basic reading composite, Student A scored a 65 and Student B scored a 64. Both scores are in the first percentile. On the reading comprehension composite, Student A scored a 73, which is in the fourth percentile. Student B scored a 71, which is in the second percentile. On the math composite, Student A scored a

74, which is in the fourth percentile, while Student B scored a 69, which is in the second percentile.

11. Temecula also re-administered the Bracken to Students. Student A scored a 67 on the classification total test, which is in the first percentile, and a 65 on the school readiness composite, which is also in the first percentile. Student B scored a 65 on the classification total test and a 64 on the school readiness composite. Both scores are in the first percentile. Students' scores on the second administration of the Bracken in 2008 placed them in lower percentiles than they had achieved on the administration of the test in 2005.

12. Temecula placed Students in special day classrooms for first, second, and third grade. Students were given opportunities for mainstreaming with general education students for some activities. During this time, Mother signed all IEP's Temecula proposed for Students although she did not believe that Students were making any academic progress, particularly in learning to read.

*Student A's December 2009 IEP<sup>5</sup>*

13. The last IEP's which Temecula developed for Students prior to their enrollment at Keegan is dated December 3, 2009. At the time, Students had just turned nine years old and were in the third grade. Students attended a special day class and received related services in speech and language therapy and occupational therapy. Rather than taking standard state assessments, Students' IEP teams had previously found them eligible to take the California Alternative Performance Assessment (CAPA) because Students' academic levels were so far below grade level that any modifications and/or accommodations that could be made on standard testing would still not make standard testing appropriate for them.

14. At the time of the December 3, 2009 IEP meeting, Student A was reading at a first grade level with 60 percent accuracy. He knew most letter sounds although he confused some of them. Student A often read from memory rather than followed along with words. Student A often referred to pictures to help him remember words. At the time, Student A was only able to read 50 percent of Kindergarten sight words and 30 percent of first grade sight words. Student A worked hard to identify the beginning sounds of words but struggled with the ending parts of the words. If he did not know a word, Student A would look at the pictures in the book and try to guess it. He was able to answer basic comprehension questions from his weekly story. Student A sometimes was able to read a word one day but then be unable to read it the next. He appeared to be better memorizing words than decoding them.

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<sup>5</sup> Student A's and Student B's 2009 IEP's contained almost identical prior goals, present goals, and programming. There were small differences in their present levels of performance.

15. Student A was able to articulate a full sentence but not write it. He required help writing each word of a sentence. Although Student A had worked hard on learning to write letters, he still was not forming them correctly and could not stay within the lines on the paper. Student A was able to write the first letter of a word with 70 percent accuracy if given a picture of what he was supposed to write. When given a picture of a word that he could read, Student A was able to write the word with 80 percent accuracy when given letter sound prompts as needed.

16. In the area of mathematics, Student A was able to count to 50 with 80 percent accuracy, although he sometimes confused numbers in the 30's with numbers in the 40's. He was also able to count from one to 100 with 70 percent accuracy, although he would sometimes get out of order when reaching numbers in the 70's and 80's. Student A was able to add and subtract single digit numbers without re-grouping, and was starting to work on adding double digit numbers. Student A was able to do these functions on tests if given a review beforehand and if provided with visual prompts. Student A could identify most coins, with the exception of the quarter, and paper money up to \$100.00. However, when asked to count out five pennies from a group of coins, Student A could count them out but then would forget the value of the other coins. After review of reading a clock, Student A could provide time to the hour and one half hour.

17. Student A was able to communicate all his wants and needs in class. His articulation errors had decreased and were not often adversely affecting Student A's speech and intelligibility. His grammar skills had been progressing steadily. Student A's auditory memory and language processing skills continued to be an area of delay, but his abilities in those areas had made steady improvement as had his pragmatic language skills. Student's voice and fluency skills were generally age appropriate. However, during the majority of the time, Student A spoke very softly and was hard to understand. He needed reminders to use a strong voice, particularly when reading.

18. Student A had no gross motor development deficits but continued to have fine motor deficits in writing, particularly with regard to the mechanics of spacing and margins. As stated above, his ability to form letters had improved.

19. In the social/emotional and behavioral areas, Student A's IEP team noted that he did not initiate play or conversation with other children. Rather, he most often chose to interact primarily with his brother, Student B. However, Student A would respond to questions from other children and would play with them when asked. Student A did well at expressing his feelings when upset or if he wanted to join his mainstream students in an activity.

20. Student A's IEP for 2008 had contained 18 goals. By the time of the December 3, 2009 IEP meeting, Student A had partially met his reading goal of identifying words from his reading program with 70 percent accuracy and had partially met his reading goal of being able to sound out 10 CVC words, which are words that consist of a starting consonant, followed by a vowel, with an ending consonant. Student A had partially met his

vocational goal of stating his phone number with 100 percent accuracy, and had fully met his vocational goals for stating his birthday and identifying 10 survival signs (such as “Don’t Walk”). Student A had partially met his communication development goals in the areas of using all speech sounds correctly and using visual cues to retell a familiar story. Student A had fully met his three other communication goals of correctly using pronouns within sentences when given visual stimulus, asking questions using correct syntax without prompts, and correctly answering riddles when given visual cues. Student A had also partially met his two writing goals of correctly writing 10 CVC words when presented with them, and copying three sentences that Student A had dictated to an adult, using proper letter size. In the area of mathematics, Student A had partially met two of his six mathematics goals in the areas of stating the answer to double digit addition and subtraction problems using a number line. Student A had met his four other mathematics goals in being able to rote count to 100 with 80 percent accuracy, identifying numbers one to 50, identifying coin and paper money with 80 percent accuracy, and identifying time to the nearest half hour, with 80 percent accuracy.

21. Student A’s December 2009 IEP team developed 15 new goals for him with the hope that he would meet them by December 2010:

- a. Goal one, communication development: correctly use all speech sounds within sentences at least 80 percent of the time during structured speaking activities, as measured by clinical probes;
- b. Goal two, communication development: listen to a four to six sentence “story” with a visual cue and state the main idea of 4/5 stories in two consecutive sessions as measured by clinical probes;
- c. Goal three, communication development: use visual cues to retell a familiar story using appropriate sequence, complete sentences with correct grammar, including verbs and plurals, and details in 9/10 trials as measured by clinical probes
- d. Goal four, communication development: use mnemonic device to orally describe objects providing at least three attributes (e.g. category, function, parts) in 8/10 trials as measured by clinical probes;
- e. Goal five, reading: when given a page of text from an early reading or his reading program book, point to and identify read letters, words and sentences with 80 percent accuracy in 4/5 trials as measured by teacher charted observation;
- f. Goal six, reading: when given 10 CVC words orally and in written form, identify initial, middle and ending sounds and blend the sounds to make words with 80 percent accuracy in 4/5 trials as measured by teacher made tests/charted records;

- g. Goal seven, reading: when given a list of 10 words, or in isolation on word cards, gathered from Kinder and first grade sight word lists, read the words with 80 percent accuracy in 4/5 trials as measured by teacher observation and records;
- h. Goal eight, writing: when given five to 10 CVC words from the same word family (at, ap, am, ad, et, it, ot, eet) and mixed word families, write the words with 80 percent accuracy in 4/5 trials as measured by student work samples;
- i. Goal nine, writing: organization and focus: when preparing for a written assignment, fill in a graphic organizer or an outline of three ideas in the pre-writing process, with 80 percent accuracy in 4/5 trials as measured by student work samples;
- j. Goal 10, math (place value): when given two random numbers between zero and 300, write the correct symbol (less than, equal to, or greater than) with 80 percent accuracy on 4/5 consecutive trials as measured by student work sample;
- k. Goal 11, math: when shown a penny, nickel and dime, state the name of the coin, the value of the coin, and when given two to five same coins, orally count out the value with 80 percent accuracy in 4/5 trials as measured by student work sample and teacher observation and records;
- l. Goal 12, math (addition and subtraction): when given 10 two/three digit addition/subtraction problems without regrouping, write sums with 80 percent accuracy in 4/5 consecutive trials as measured by teacher-made tests and student work;
- m. Goal 13, math (measurement): state the days of the week in order, identify today's date, tomorrow, yesterday, as well as stating the months of the year in order, with 80 percent accuracy in 4/5 trials, as measured by teacher observation and teacher records;
- n. Goal 14, writing: when given letters, 10 CVC words from a written model or dictation, use correct letter formation, size and spacing with 80 percent accuracy in 4/5 trials as measured by student work samples;
- o. Goal 15, writing (sentence structure): when given three incorrect word order sentences at his reading level, rewrite the words in correct order, with capitalization and ending punctuation, with 80 percent accuracy in 4/5 trials as measured by student work.



22. Student A's special education teacher, Student A, his parents, and at times, a one on one afternoon aide, were the persons responsible for implementing all of Student A's goals.

23. In order to implement these goals, Student A's IEP team considered several alternative placements for him, including a general education classroom with and without supports. The team eventually determined that Student A required the following special education and related services in order to receive a FAPE and make reasonable progress in his curriculum:

- a. 240 minutes a day of specialized academic instruction (SAI) in a separate classroom in a public facility to be provided by a special education teacher;
- b. 50, one half hour sessions of group speech and language therapy per year in a separate classroom to be provided by a speech and language teacher;
- c. 20, one half hour sessions of group occupational therapy per year in a separate classroom to be provided by occupational therapy staff.

24. Student A's IEP team determined that he would spend 70 percent of his time outside the general education environment because he required intensive instruction in core academic areas of reading, writing, and math to continue to make progress.

25. Student A's IEP team determined that he qualified for extended school year services as well.

26. Finally, Student A's IEP team determined that he needed the following accommodations in the classroom: repeat back directions; check for understanding when giving directions; give more time if needed for classwork; use visuals and manipulatives when possible; note taking service; and additional support in the afternoon for mainstreaming.

#### *Student B's December 2009 IEP*

27. At the time of the December 3, 2009 IEP meeting, like Student A, Student B was able to identify upper and lower case letters with over 80 percent accuracy as well as corresponding letter sounds with 70 percent accuracy. However, Student B continued to confuse or miss many letter sounds. He was able to read more than 20 words from his reading program list without visual cues. When given the visual cues, Student B was able to recognize over 50 words. Like Student A, Student B relied on memorizing words that were read to him out loud. When tasked with pointing to words that he and/or the teacher had read, Student B could only do so 50 percent of the time and would often guess instead. When asked to point out a word from a group of three to five written on cards, where the

words had different starting, Student B was able to pick out the word 80 percent of the time. However, if the words had the same starting letter, his success rate dropped to 40 percent.

28. In the area of writing, Student B was able to write out each letter of the alphabet from dictation with 70 percent accuracy although his letter formations were not always clear. On spelling tests, Student B struggled if asked to spell words out of the order originally given to him. He was not able to write a complete sentence by himself.

29. In mathematics, Student B was able to count to 50 with 80 percent accuracy and to 100 with 70 percent accuracy. He would become confused with numbers in the 40's and in the 50's. Student B was able to add and subtract simple one digit numbers but could not do so with two digit numbers. Like Student A, Student B could visually identify coins, with the exception of the quarter, and paper money up to \$100.00. Student B's performance on math would vary on a daily basis.

30. Student B's receptive vocabulary and language skills were progressing as of the time of his 2009 IEP, as were his expressive vocabulary skills, language processing, pragmatic skills, and grammar skills. Student B continued to have articulation difficulties with errors in a few phonemes although his voice and fluency skills appeared age appropriate.

31. Although Student B had no gross motor deficits, he continued to have fine motor deficits in writing and forming letters, and staying within the lines on writing paper.

32. In the area of social/emotional and behavior, Student B's IEP team noted that he had had a difficult transition to third grade and had difficulty being compliant in class. A token based reward system had helped address his off-task and non-compliant behaviors, although Student B continued to prefer standing to sitting when doing class work. Student B read in too low of a voice to be understood. He tended to want to stay away from other students in the class and preferred to eat alone.

33. Like Student A, Student B had 18 goals in his 2009 IEP. By the time of the December 3, 2009 IEP meeting, Student B had partially met his reading goal of identifying words from his reading program with 70 percent accuracy and had partially met his reading goal of being able to sound out 10 CVC words, with 80 percent accuracy. Student B had fully met his vocational goal of stating his phone number with 100 percent accuracy, and had fully met his vocational goals for stating his birthday and identifying 10 survival signs (such as "Don't Walk"). Student B had partially met his communication development goals in the areas of using all speech sounds correctly, asking questions using correct syntax with no prompts (where he still needed prompts 30 percent of the time), and using visual cues to retell a familiar story. Student B had fully met his two other communication goals of correctly using pronouns within sentences when given visual stimulus, and correctly answering riddles when given visual cues. Student B had also partially met his two writing goals of correctly writing 10 CVC words when presented with them, and copying two sentences using correct spacing and staying within the lines. In the area of mathematics,

Student B also had had six goals. He had partially met one of the six in the area of stating the answer to double digit addition and subtraction problems using a number line. Student B had met his five other mathematics goals in being able to rote count to 50 with 80 percent accuracy, expressively identifying numbers one to 25, subtracting numbers under 10 using a number line, identifying coin and paper money with 80 percent accuracy, and identifying time to the nearest half hour, with 80 percent accuracy.

34. Like Student A, Student B's December 2009 IEP team developed 15 new goals for him with the hope that he would meet them by December 2010:

- a. Goal one, communication development: correctly use all speech sounds within sentences at least 80 percent of the time during structured speaking activities, as measured by clinical probes;
- b. Goal two, communication development: listen to a four to six sentence "story" with a visual cue and state the main idea of 4/5 stories in two consecutive sessions as measured by clinical probes;
- c. Goal three, communication development: use visual cues to retell a familiar story using appropriate sequence, complete sentences with correct grammar, including irregular verbs and plurals, and details in 9/10 trials as measured by clinical probes;
- d. Goal four, communication development: use mnemonic device to orally describe objects providing at least three attributes (e.g. category, function, parts) in 8/10 trials as measured by clinical probes;
- e. Goal five, reading: when given a page of text from an early reading or his reading program book, point to and identify letters, words and sentences with 80 percent accuracy in 4/5 trials as measured by teacher charted observation;
- f. Goal six, reading: when given 10-20 CVC words orally and in written form, identify initial, middle and ending sounds and blend the sounds to make words with 80 percent accuracy in 4/5 trials as measured by teacher made tests/charted records;
- g. Goal seven, reading: when given a list of 30 words, in isolation or on word cards, gathered from Kinder and first grade sight word lists, read the words with 80 percent accuracy in 4/5 trials as measured by teacher observation and records;
- h. Goal eight, writing: when given five to 10 CVC words from the same word family (at, ap, am, ad, et, it, ot, eet) and mixed word families, write the

words with 80 percent accuracy in 4/5 trials as measured by student work samples;

- i. Goal nine, writing: when preparing for a written assignment, fill in a graphic organizer or an outline of three ideas in the pre-writing process, with 80 percent accuracy in 4/5 trials as measured by student work samples;
- j. Goal 10, writing: when given 10 CVC words and simple two – three word phrases from a written model/diction, use correct letter formation, size and spacing with 80 percent accuracy in 4/5 trials as measured by student work samples;
- k. Goal 11, writing (sentence structure): when given five incorrect word order sentences, at his reading level, rewrite the words in correct word order, with capitalization and ending punctuation, with 80 percent accuracy in 4/5 trials as measured by student work samples and teacher observation;
- l. Goal 12, math: when given two random numbers between 0 and 300, write the correct symbol (less than, equal to, or greater than) with 80 percent accuracy on 4/5 consecutive trials as measured by student work sample and teacher observation;
- m. Goal 13, math: when shown a penny, nickel and dime, state the name of the coin, the value of the coin, and when given two to 10 same coins, orally count out the value with 80 percent accuracy in 4/5 trials as measured by student work and teacher observation and records;
- n. Goal 14, math: when given 10, 2/3 digit addition/subtraction problems without regrouping, write sums with 80 percent accuracy in 4/5 consecutive trials as measured by teacher-made tests and student work; and,
- o. Goal 15, math (measurement): state the days of the week in order, identify today's date, tomorrow, yesterday, as well as stating the months of the year in order, with 80 percent accuracy in 4/5 trials, as measured by teacher observation and teacher records.

35. Student B's special education teacher, Student B, his parents, and at times, a one on one afternoon aide, were the persons responsible for implementing all of Student B's goals.

36. Student B's IEP team considered several alternative placements for him, including a general education classroom with and without supports. The team eventually

determined that Student B, like Student A, required the following special education and related services in order to receive a FAPE and make reasonable progress in his curriculum:

- a. 240 minutes a day of specialized academic instruction (SAI) in a separate classroom in a public facility to be provided by a special education teacher;
- b. 50, one half hour sessions of group speech and language therapy per year in a separate classroom to be provided by a speech and language teacher;
- c. 20, one half hour sessions of group occupational therapy per year in a separate classroom to be provided by occupational therapy staff.

37. Student B's IEP team determined that he would spend 70 percent of his time outside the general education environment because he required intensive instruction in core academic areas of reading, writing, and math to continue to make progress.

38. Student B's IEP team determined that he qualified for extended school year services as well.

39. Finally, Student B's IEP team determined that he needed the following accommodations in the classroom: repeat back directions; check for understanding when giving directions; give more time if needed for classwork; use visuals and manipulatives when possible; note taking service; and additional support in the afternoon for mainstreaming.

40. Mother was present at the December 3, 2009 IEP meeting. She signed her consent to both boys' IEP's at the IEP meeting. Temecula implemented the IEP's for the rest of the 2009-2010 school year.

#### *Students' Mother*

41. Mother testified at the hearing. In spite of the emotional burden of having to testify about her children's significant deficits, Mother gave straightforward answers to questions. She was not evasive and appeared truthful. She was a credible witness.

42. Mother has been a credentialed general education teacher since November 2008. Prior to obtaining her credential, Mother was a substitute teacher. She continued substituting after obtaining her credential due to lack of full-time teaching opportunities. As will be discussed below, Keegan hired Mother as a general education teacher shortly after the beginning of the 2010-2011 school year. Mother was assigned to the class that Students attended. Mother was one of Students' teachers for a period of approximately one and a half years, until she was laid off by Keegan in January 2012.

43. Mother's coursework for her teaching credential only included one class related to special education. The course primarily focused on collaborative teaching between general education and special education teachers and on inclusion of special needs children in general education settings. Mother has no other special education training. She has never had responsibility for drafting or implementing IEP goals and has never been trained on how to do so. She has never provided special education to any of her students and has never drafted an IEP.

44. Mother, however, has been involved in Students' special education since they were found eligible for IEP's. She often volunteered in Students' classrooms, attended all IEP meetings for Students, and received procedural safeguards from Temecula. During the more than five years that Students attended school at Temecula, Mother was aware that she could request additional IEP meetings when she believed Students were not progressing and she in fact exercised that right several times.

*Events Leading to Students' Enrollment at Keegan for the 2010-2011 School Year*

45. Sonja Clause is a founding director of the Keegan Academy. She has been its Principal and a member of its Board of Directors since Keegan was chartered. She also teaches at the school. Ms. Clause has a bachelor's degree in English and a master's degree in education. She has a credential in staff development. Ms. Clause is also a certified reading specialist. She has over 20 years of teaching experience, including having been a supervising teacher for children enrolled in home school general education programs. Ms. Clause is not a special education teacher or provider of special education related services. She has not taken specific special education courses and has not taught special education students outside of a general education setting.

46. Ms. Clause testified at the hearing. It was apparent from her testimony that she is passionate about teaching and about her undertaking to help develop a charter school where instruction would be geared to each child's individual needs, learning styles, and pace of absorbing instruction. Ms. Clause gave very truthful testimony. However, it was also apparent during the several hours she testified that she was somewhat overwhelmed and frustrated by having to provide special education within the context of the charter school setting and to differentiate the special education instruction from the charter school model. Ms. Clause also failed to have a firm grasp of the IEP process regarding Students although she had been the LEA representative at their IEP meetings held at Keegan.

47. Ms. Clause's original vision was to create a highly supportive charter school program primarily for independent study students that would include parent workshops and other support mechanisms as well. She founded Keegan along with several other women who were parents of school-aged children who wanted an atypical, more individualized school program than what they felt the regular public schools were providing. Some of the other founders became teachers at Keegan while one of the founders became Keegan's office manager.

48. Temecula approved the charter for Keegan in October 2009. Keegan was chartered as a charter school of Temecula Valley Unified School District. This means that Temecula is the local educational agency and that Keegan, although a charter that operates independently of some of the statutes and regulations covering public schools, is a Temecula school. Keegan is not its own LEA. As discussed in the Legal Conclusions below, this distinction becomes important when analyzing Temecula's and Keegan's respective responsibilities and obligations to special education students.

49. The original charter provided that Keegan would be an independent study program which meant that the students would be taught at home by their parents with oversight by Keegan teaching staff. The independent study model also includes minimal instruction at the school site for the students. However, between the time Keegan was chartered and the time the school actually began serving students in August 2010, the model evolved. Ms. Clause explained that parents who enrolled their children in Keegan did not want a traditional independent study model. Rather, they preferred the more traditional model of on-site teaching at the school by a credentialed teacher. Keegan arrived at a compromise for those parents who preferred on-site teaching. The program that developed, and which was in place for the 2010-2011 and 2011-2012 school years, when Students attended Keegan, was on-site teaching four days a week for full six hour school days by credentialed teachers, with Mondays designated as an independent study day at home. For those children whose parents did not wish them to be instructed at home, Keegan provided enrichment classes at its school site. Since all teachers were required to be present at Keegan's "brick and mortar" building on Mondays, the children of teachers such as Mother who were enrolled at Keegan generally attended the enrichment sessions on Mondays.

50. When a child attends an independent study charter school, state education law requires that the child and his or her parents sign a master agreement for independent study. The master agreement generally lists when the student must report to the teacher overseeing the independent study, what the course work will be, and how the student will be evaluated. Although Students only attended independent study one of five days a week, Keegan had them sign a master agreement. Keegan argues that its program was independent study and that is why it required its students to sign the master agreement. However, the evidence does not support this proposition. The majority of Keegan students attended school four days a week for six hours of instruction in a classroom taught by a credentialed teacher. The fact that the original charter was for independent study does not change what the program actually became.

51. Keegan's charter requires it to accept students who live anywhere in Riverside County, where Temecula Valley Unified School District is located, as well as any students who live in adjacent counties, subject to space availability.

52. Mother learned about Keegan in spring 2010 from a friend of hers who became one of Keegan's founders. Mother had become concerned that Students were not making progress in their SDC placement at Temecula. She also was concerned about issues in the classroom as well. Mother volunteered in the classroom and saw other students having

outbursts and emotional meltdowns. Students told her that they could not concentrate because of the distracting behavior by other children. They also expressed to her that they were frustrated with school in general. Mother saw the Keegan Academy Charter School as an alternative to her concerns with public education at Temecula.

53. Mother and Stepfather met with Ms. Clause in June or July 2010 at a coffee house. Mother brought Students' IEP's with her and showed them to Ms. Clause. Ms. Clause explained that Keegan was not going to be an independent study program as originally planned but that it would have a four day a week on campus program. Ms. Clause explained that the classes would be small, that there would be individualized instruction, and that there would be many hands-on opportunities for learning. Parents were concerned whether the school would be a "good fit" for Students given their deficits as identified in their IEP's. Ms. Clause assured Parents that given Keegan's planned environment and teaching model, she felt that it was appropriate for Students. Ms. Clause also explained to Parents that she was a credentialed reading specialist and that she would provide reading instruction directly to Students given that their reading deficits were of such concern to Parents. Ms. Clause also assured Parents that special education services would be available for Students at Keegan.

54. Mother filled out enrollment papers for Students to attend Keegan around the same time she first met with Ms. Clause. Mother also signed a consent form permitting Keegan to obtain all of Students' school records from Temecula. Ms. Clause did not ask Mother for a copy of any of Students' IEP's or other records at this meeting or at any time Students attended Keegan. Neither Ms. Clause nor anyone else at Keegan ever informed Mother that there was a delay in receipt of Students' school records or that any of the records were missing.

55. Neither Ms. Clause nor anyone else from Keegan or from Temecula ever informed Mother that IEP programming or services would not be available at Keegan or that there was any type of limit on the programming or services that Keegan could or would be able to provide.

56. Keegan was scheduled to begin classes in early August 2010. Several times prior to the start of the school year, Mother asked Ms. Clause and other Keegan staff what the status was of special education and related services that needed to be provided to students with IEP's who had enrolled at the school. Ms. Clause tried several times to contact someone at the Special Education Department at Temecula for information. Ms. Clause was aware that since Temecula was the LEA, it normally would be responsible for providing special education and related services to children at Keegan who had IEP's. Ms. Clause was extremely busy trying to arrange for the inauguration of classes at Keegan. Mother and other parents offered to attempt to contact Temecula to get the information regarding the special education situation. Mother telephoned several times. She was initially not connected to anyone at Temecula who had the information she sought. Mother finally reached Temecula's previous Special Education Director. He informed her that Temecula would provide the appropriate special education support just as it was required to do with all of its



schools. However, he did not provide any specifics regarding what the special education services would look like, who would provide them, or when they would begin.

57. Keegan began operations in early August 2010 as scheduled. There were initially less than 30 children enrolled. Of these 30, five, including Students, had IEP's. As of the hearing, there were 85 children enrolled at Keegan.

*Events from Start of 2010-2011 School Year to Students' November 29, 2010 IEP's*

58. Mother explained that she and other parents were present at Keegan for the first few days after school started in August 2010. Everyone was getting their bearings. Parents remained at school to help with resources and lessons. There were general discussions among the parents as to when special education services would begin and who would provide them. Ms. Clause still could not provide any insight because Temecula had not given her or any of the parents any definitive answers.

59. About two weeks into the fall 2010 semester, Ms. Clause approached Mother and asked her if she would accept a teaching position at Keegan teaching the class to which Students were assigned. Ms. Clause knew that Mother had a general education multiple subject teaching credential. Mother accepted the job offer. It was her first full-time teaching position.

60. Given the small number of students enrolled at Keegan, each class served several grades. Mother was assigned to a class of second to fourth graders. There were also a couple of first graders assigned to the class as well. Students had just started fourth grade. Mother was assigned to co-teach the class with teacher Tracey Bell.<sup>6</sup> Students were placed in a small group of students for instruction in both areas. The other children were two to three grades behind Students but were still more advanced in language arts and math than were Students. There was no instructional aide assigned to any of Students' teachers.

61. Neither Ms. Bell nor Mother was provided with a special education curriculum to use with Students. The only specialized curriculum they were given was Making Meaning, which is a general education reading comprehension and writing program. Keegan provided them with the Making Meaning third grade curriculum that was used for all children no matter their grade level. The children would read out loud in their groups, and then would either work with a partner or independently to complete assignments in workbooks.

62. Language arts instruction was provided in the morning. After lunch, the children were instructed primarily in math, with social science and science instruction provided if there was time. Mother stated that math instruction often took longer than two hours because several children, including Students, were struggling and because the children

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<sup>6</sup> Ms. Bell did not testify at the hearing.

were in so many different grades. As with the reading program, Keegan was generally using the third grade curriculum in most subjects for all children, modifying it for their grade level.

63. Initially, Ms. Clause was providing pull-out general education reading intervention services for Students. These are the services she had described to Parents at their initial meeting regarding Keegan in June 2010. However, Ms. Clause had to stop providing the services after a few weeks because she had too many other duties competing for her attention. No one else assumed responsibility for providing the reading services to Students when Ms. Clause ceased providing them. Parents were very upset that the services were discontinued and later expressed their dismay at Students' IEP meetings.

64. Mother asked Ms. Clause several times during the first few months of school when the special education services would start. Ms. Clause replied that Keegan was working on it and that the services would be implemented shortly. Mom agreed at hearing that Keegan staff was actively attempting to get Temecula to provide the services.

65. Mother was never directed to address Students' IEP goals. Even had she been so directed, she would not have known how to do it. She did provide some of the accommodations from Students' IEP's, such as checking to see that Students understood instructions.

66. Ms. Clause and Keegan staff realized that Temecula was not going to provide the necessary special education support for the Keegan students with IEP's. Keegan therefore decided to search for appropriate special education providers and to have funding directed through Keegan rather than through Temecula. This is an appropriate alternative provided for under the Education Code. Keegan and Temecula executed an agreement concerning Keegan's rights and obligations as a charter school of Temecula, which also permitted Keegan to contract for its own special education services. The agreement specifically states that children with special needs attending Keegan will be provided with special education and related services in the same manner as do children who attend any other Temecula school. The agreement, at Article IV, section 4.1, specifically states the following:

4.1 **Services.** Pursuant to Education Code Section 47641(b), the Charter School does not elect to be treated as a local educational agency in accordance with Education Code Section 47641(a) and therefore will not be deemed a local educational agency for purposes of compliance; with the Individuals with Disabilities Education Act (20 U.S.C. Section 1400, et seq.) (Hereinafter "IDEA") but shall be deemed a public school of the local educational agency that granted the charter. As such, the parties understand and agree that the District shall ensure that all students with exceptional needs who attend the Charter School are provided with a free and appropriate education in compliance with the IDEA. A child with disabilities attending the charter (sic) School shall receive special education instruction or designated instruction and services, or both, in the same manner as a child with disabilities who attends another public school of the District (see Education Code

4764 (sic)). Charter School is responsible for the cost associated with providing services to students with disabilities. Charter School may contract with the District for necessary services that Charter School staff cannot provide. District approval is required for the Charter School to contract with others for the provision of special education services.

67. Temecula ultimately gave Keegan permission to contract for its own special education services. Keegan signed a contract with Total Education Solutions in about October 2010. However, TES had difficulty finding providers to work at Keegan. As of the date of Students' November 29, 2010 IEP meeting, TES had not assigned any staff to serve Students.

68. As of the date of Students' November 29, 2010 IEP meeting, Students had received no special education SAI services, no speech and language therapy, and no occupational therapy, as required by their December 2009 IEP, since beginning school at Keegan. Keegan had not implemented any portions of Students' December 2009 other than a few of the listed accommodations.

#### *November 29, 2010 IEP's*

69. Keegan scheduled Students' annual IEP meetings for November 29, 2010. Students were almost 10 years old and in fourth grade. Prior to the IEP, Keegan did not administer any special education assessments to Students to determine their present levels of performance. As stated above, Keegan had not been able to provide any of Students' special education instruction or related services to them up to that point. Therefore, Students had no current special education providers who could discuss their present levels of performance as background to a discussion of Students' present special education needs.

70. Mother, as one of Students' general education teachers, filled out a form entitled "Present Levels" for each boy. With regard to Student A, Mother indicated that his reading abilities were at a beginning stage and that he was beginning to sound out words more independently. She also indicated that Student A's near and far point copying skills was good and that he could copy some words independently. In math, Mother indicated that Student A could do basic addition and subtraction. In the area of communication, Mother indicated that Student A could communicate effectively but that he struggled with correct sentence structure. She also indicated that Student A could print decently, but not at grade level.

71. Mother did not provide any present levels for Student B's reading, writing, or math skills. As with Student A, Mother noted that Student B communicated effectively but that he also had trouble with correct sentence structure and that he needed to improve his printing.

72. As stated above, Mother was not asked to work on any of Students' respective 15 goals, nor was she capable of doing so. She therefore could not provide any information related to Students' progress on their goals or whether any of the goals had been met.

73. The IEP teams for both Students on November 29, 2010, consisted of Mother, who attended both as Students' parent and as their general education teacher and Ms. Clause, who attended as the LEA administrative designee. Although present as Temecula's administrative designee, Ms. Clause did not have any independent knowledge of Temecula's special education programs and did not have any authority to commit services specifically from Temecula should that have been necessary. Ms. Clause believed that if an issue arose that required Temecula's assistance, she would have followed up later with them.

74. Also present at the IEP meetings was Dana Tappan, who at the time was a TES regional director for Southern California. Ms. Tappan, who testified at the hearing, is a speech language pathologist licensed in California and nationally. She has worked as an SLP with three school districts in addition to the two years she worked as a TES director. During her tenure with TES, Ms. Tappan worked with about 10 different charter schools. Over her career as an SLP, Ms. Tappan has worked with 300 to 400 students. She has provided direct services to students and has administered speech and language assessments to them. However, at the time of the November 2010 IEP meetings, Ms. Tappan had not met either Student, had never assessed either of them, and had never provided either boy with any type of services.

75. Also present and participating at this IEP meeting was a TES special education teacher named Danielle Garcia who attended the IEP meetings as the special education teacher representative. Ms. Garcia had never provided any instruction or services to either Student and had not even met them at the time of this IEP meeting. Ms. Garcia did not testify at the hearing.

76. Ms. Tappan, who did testify at the hearing, explained that she and Ms. Garcia prepared Students' draft IEP's and draft goals. They did not have any present performance information for either boy because neither had been receiving special education instruction or services. Mother was only able to provide general information regarding Students' performance in her general education classroom. Since Mother had not been working on Students' goals, she was unable to provide the IEP team with information regarding Students' progress on their goals. There were no recent special education assessments of Students because no one at Keegan had assessed Students. Ms. Tappan, Ms. Garcia, and Ms. Clause did not consider contacting Students' special education providers at Temecula from their previous school year.

77. Although Keegan had requested Temecula to forward both Students' educational files, Temecula did not do so in a timely fashion. And, when the files did arrive at Keegan, they were originally misplaced. At the time of the November 29, 2010 IEP meeting, Students' educational files at Keegan did not even contain their current December 2009 IEP. The most recent IEP in their files was from December 2008, which meant the

information in them was two years old at the time of this IEP meeting. No one from Keegan, including the TES professionals, thought to contact Temecula to ask for Students' current IEP's. Nor did they ask Mother to provide them with copies. Instead, Ms. Tappan and Ms. Garcia, who drafted the proposed November 29 IEP's, including present levels, goals, and services, simply used the information contained in Students' two-year old IEP's and developed a new IEP for them. Students' present levels of performance in all areas were derived from the two-year old IEP's, other than information Students' parents could provide regarding their social/emotional and behavioral needs at school and at home.

78. Ms. Clause had only a vague recollection of Students' November 29, 2010 IEP meetings. She could not recall who provided the information for any of Students' present levels of performance and did not know who had developed the proposed goals. She did agree that the November 29, 2010 IEP was based primarily on information from Students' prior IEP's due to the lack of current information regarding their present levels of performance.

79. Although Students' December 2008 IEP's had contained 18 goals, and their December 2009 IEP's had contained 15 goals, Ms. Tappan and Ms. Garcia proposed only 10 goals for them. Ms. Tappan only proposed two speech and language goals, one for articulation and the other for storytelling. Ms. Tappan did not develop any goals to address Students' other language deficits in receptive and expressive language, language processing, grammar, and pragmatics. At hearing, Ms. Tappan agreed that other goals should have been written for Students. The goals she and Ms. Garcia did propose were exact duplicates of Students' goals from their December 2008 IEP's that were then two years old. The goals they proposed contained no baselines because they had no current baselines. As Ms. Tappan acknowledged at hearing, it would not be possible to determine if Students were progressing on their goals because there was no baseline to which to compare their progress. Neither Ms. Tappan nor Ms. Clause could explain why the IEP teams decreased the amount of Students' goals or how progress on the goals would be determined given the lack of baseline data.<sup>7</sup> Their only explanation at hearing was that Mother agreed to the IEP and that they therefore considered it to be sufficient.

80. As stated above, Students' December 2009 IEP had provided them with 240 minutes per day of specialized academic instruction to be provided by a special education teacher (for a total of 1200 minutes a week); 50, 30 minute sessions a year of group speech and language therapy; and 20, 30 minute sessions a year of group occupational therapy. At the November 29, 2010 IEP meetings, Ms. Tappan and Ms. Garcia proposed decreasing Students' specialized academic instruction to three, 90 minute sessions a week, for a total of 270 minutes a week. The 270 minutes is just over 22 percent of the SAI services provided in Students' December 2009 IEP. Ms. Tappan and Ms. Garcia also proposed decreasing Students' speech and language services to once a week for 30 minutes during the school

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<sup>7</sup> Students' prior IEP's suffer from similar lack of concrete baselines but those IEP's are not at issue in this case.

year, signifying that Students' speech and language services were reduced from 50 sessions a year to approximately 36 sessions a year. Finally, Ms. Tappan and Ms. Garcia proposed reducing Students' occupational therapy sessions from 20 times a year to once a month during the school year, which was a decrease from 20 sessions a year to approximately nine sessions a year.

81. There was no discussion at the November 29, 2010 IEP meetings as to why it was appropriate to decrease the special education and related services for Students. Keegan had not administered any assessments to Students to support the propriety of the decrease. No special education professional had observed Students during the course of their approximately 12 weeks of schooling at Keegan to support a finding that their special education needs had decreased or that they had made such dramatic progress that the significant decreases were warranted. Mother did not provide any information to support progress that would justify such significant decreases in services. At hearing, neither Ms. Tappan nor Ms. Clause could offer any explanation for the decrease in SAI and related services other than the fact that Students were attending a charter school that offered smaller general education classes than did their previous public school. Because there was no special education provider present who had ever provided services to Students, there was no coherent discussion of Students' special education needs or if it was advisable to decrease services for 10 year old boys who were academically performing many years below grade level and whose speech still was not fully comprehensible. There was no discussion of the ramifications of the findings of the prior IEP's that Students still had significant communication and academic deficits and no finding that those deficits had been remediated.

82. Both Ms. Tappan and Ms. Clause suggested at hearing that the reduction in Students' special education and related services was appropriate because Mother, who was a general education teacher, agreed with the recommendations. They also justified the reduction in services because Keegan's smaller class size provided more individualized instruction than did normal public school classes, albeit in a general education rather than special education setting. However, they offered no concrete explanation, based upon Students' actual needs, that supported such the drastic decrease in special education and services provided under the November 29 IEP's. Perhaps even more perplexing is the fact that Keegan determined to decrease Students' OT services even though there was no occupational therapist even in attendance at Students' IEP's to discuss Students' OT needs.

83. Nothing in Keegan's charter or any services agreement it had with Temecula dictated the amount of SAI or related services Keegan could offer to any of its students. Nothing in the law prevented Keegan from offering to Students the amount of SAI hours or related services that Temecula had previously provided to them. Nothing prevented Keegan from hiring its own special education instructors or related service providers. Nor did anything in Keegan's contract with TES prevent Keegan from contracting for more services hours from TES.

84. Students' November 29 IEP's also determined that they qualified for extended school year services in summer 2011. The IEP's indicated that the ESY would start on June

27, 2011, and end on July 29, 2011. The IEP's indicated that Students would receive one session of occupational therapy a month and one session a week of speech and language therapy during ESY 2011.

85. The November 29, 2010 IEP teams discussed various placements for Students, including full time placement in general education, placement in general education with supplemental aids and services, placement in general education with supplemental related services, and placement in general education with consultation and/or collaboration from a special education teacher. At the time of this meeting, no one, including Mother, believed that Keegan was not an appropriate placement for Students. All IEP team members, including Mother, believed that Keegan could put together a program to serve Students. No one, including Mother, suggested that the team consider placement outside of Keegan, be it at another Temecula school or in a non-public school. Therefore, the fact that Ms. Clause was not familiar with other special education programs and/or services that Temecula could offer, and was not authorized to offer them in any case, had no impact on the course of these IEP meetings or on the programming offered to Students.

86. At the November 29 IEP team meetings, Students' IEP teams also briefly discussed the fact that Students had missed approximately 12 weeks of specialized academic instructions and related services to that point that was supposed to be provided per their December 2009 IEP's. The teams agreed that TES personnel would calculate the amount of compensatory education owed to Students because of Keegan's failure to implement their IEP's. However, TES decided to calculate the amount of compensatory services based upon Students' new November 29, 2010 IEP's rather than based upon the services delineated in their prior IEP's, which had been in effect at the time the services were not implemented. TES staff informed Mother of how they were calculating the compensatory services. Mother did not voice an objection to the method of calculation. At hearing, neither Ms. Tappan nor Ms. Clause could explain why it was proper to base the calculation of services owed using the new IEP's, other than the fact that it was more efficient to do so and that they believed that it would provide Students' with sufficient compensatory education. They had no concrete information on which to base their opinions that the compensatory services offered were sufficient.

87. There was little discussion at the IEP meetings regarding the contents of the IEP's, the programming offered, or the goals developed. There was no indication that Keegan was not an appropriate placement for Students. Mother did not contest any of the IEP decisions because she always had believed that school district's IEP team members were more knowledgeable than she about what was correct for Students. Students' IEP teams, including Mother, unanimously agreed to the new IEP's.

#### *November 29, 2010 IEP to February, 2011*

88. TES had significant difficulty contracting employees to provide services at Keegan. TES provided a few hours of OT services in December 2011. TES also contracted a special education resource specialist teacher for Students soon after the November 29 IEP.

However, after observing Students for a day, this teacher decided to leave TES and pursue another profession. He never provided any services to Students. TES was unable to contract with any special education providers for Keegan until February 2011. Therefore, even accounting for Keegan's closure for its winter break and other holidays, Students' IEP's were not implemented for approximately another six to seven weeks. In total, Students were deprived of any special education and related services for the first 20 weeks or so that they attended Keegan.

89. Keegan convened amendment IEP team meetings for Students on January 24, 2011. The purpose of the meetings was to amend Students' IEP's to reflect that they would participate in state testing with various accommodations provided. The IEP teams also added various classroom accommodations for both boys. No special education instruction or related services were at issue or discussed. Mother signed the IEP's as Students' parent. Tracy Bell, the general education teacher who was co-teaching Students' class with Mother, signed as the general education teacher. Mother agreed to the amendments.

90. Keegan convened an additional amendment IEP team meeting for Students on February 3, 2011. The purpose of the meetings was to discuss the amount of Students' special academic instruction and their progress at school. The IEP teams consisted of Ms. Clause, Mother, Ms. Bell, Ms. Tappan, and Ms. Garcia. As of this meeting, TES had not yet begun to provide any instructional or related services to Students.

91. Someone on the team suggested increasing Students' SAI to 181 minutes a day, based upon what their 2008 IEP's had provided. At hearing, Mother, Ms. Tappan, and Ms. Clause could not recall where the concept of 181 minutes a day had arisen because none of Students' prior IEP's had ever provided that amount of services. However, the teams rejected increasing Students' SAI because the team members continued to believe that Students' needs were being met by the small class size at Keegan and the accommodations that had been implemented in the classroom. The teams noted the progress Students had made in reading: Student A's scores on the general education assessment called measures of academic progress (MAP) indicated he had improved from 143 to 156 on the test over the months he had been at Keegan, while Student B's scores had improved from 141 to 157.<sup>8</sup> The increased scores, however, were still many grade levels below where Students should have been. And, as discussed below, Students did not retain these strides, later demonstrating significant regression in language arts during the two years they were at Keegan.

92. Mother continued to agree to the decrease in services provided to Students based upon the small class environment at Keegan.

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<sup>8</sup> Student A's February 3, 2011 IEP erroneously indicated his latter score was 166, which was a typographical error.



*February 2011 through End of the Spring 2011 School Semester*

*Specialized Academic Instruction*

93. Gina Bates was assigned by TES to provide the SAI services to Students as provided in their November 29 IEP's, as well as to provide the compensatory services TES had calculated for them. Ms. Bates is presently a resource program coordinator for TES. She initially worked for TES providing direct services to students, which she was doing at the times at issue in this case. Ms. Bates has a master's degree in education and a teaching credential. Her testimony at hearing was direct and non-evasive. The overall impression she gave was that there were several aspects of Students' programming at Keegan with which she disagreed, but that she was only one member of their IEP teams, and therefore could not personally effectuate changes. Her frustration with having been unable to do so was apparent during the course of her testimony through the way she answered questions and through her body language. Ms. Bates was called as a witness by Students. At times, her answers to questions supported their position at hearing, at times they did not. Her knowledge of teaching was impressive, as was her dedication to the profession. Ms. Bates was a very persuasive witness.

94. Ms. Bates first provided SAI services to Students on February 10, 2011. Keegan provided her with copies of Students' November 29, 2010 IEP's. She was charged with implementing their academic goals in math and language arts.

95. Ms. Bates informally assessed Students' reading abilities. She used various informal reading testing instruments to determine Students' reading levels. She determined that Students could not read independently at all. They were barely starting to decode letter sounds. They could not sound out vowels and consonants correctly with any regularity. This placed Students at a "pre-primer" level. This means that they were reading at a *pre-Kindergarten* level although Students were in fourth grade at the time. Ms. Bates found that Students' reading levels were far below what was indicated by their reading goals. She determined that the goals were, in fact, too difficult for Students.

96. Likewise, Ms. Bates administered informal writing assessments to Students. She determined that their writing goals were also too difficult for Students because they were not capable of paragraph construction. Students' writing abilities in February 2011 were at the stage where they could barely master writing a simple sentence.

97. With regard to math, Students could not identify money as their prior IEP's indicated they were able to do. They could not do math word problems because they could not read them.

98. Without her informal testing, Ms. Bates could not really determine Students' levels because the baselines in their IEP's were so vague.

99. Ms. Bates provided her instructional services to Students on a pull-out basis. Typically, she taught them in a small group of two to four students.

100. Student A was highly distractible even in such a small group. If he heard a noise, he would want to open the door to see what was happening. He could not be seated for long periods of time. If Student A was either bored or too challenged, he would be distracted by anything to fidget with and would often want to change the topic of what they were presently addressing in class. Ms. Bates would have to cover the window of the classroom she used so that Student A could not see out and become distracted. To address his distractibility, Ms. Bates would give Student A frequent breaks and give him something to manipulate like a squeeze toy. Sometimes, she would just do an activity Student A preferred in order to keep his attention.

101. Ms. Bates noted that Student A had retention issues. He required much repetition and re-teaching of content. After breaks in school, such as vacation, she would have to re-teach prior lessons. Student A had retention deficits in both reading and math.

102. Student B's academic levels were very similar to his brother's. Both Students moved at a similar pace through the reading programs Ms. Bates used to instruct them. Student B was also at a pre-primer level for reading. He had the same difficulties decoding sounds. He had no ability to sound out CVC words. As with Student A, due to the lack of baselines in Student B's IEP, Ms. Bates had to develop her own baselines for him through informal assessments and looking at samples of his work. Due to the lack of baselines for both boys, she could not measure progress without first doing her own assessments. Like Student A, Student B's academic skills in math and language arts were far lower than what Student B's goals indicated he was capable of doing at the time.

103. Student B's math skills were a bit lower than Student A's. Student B too was not able to identify money, although his prior IEP's indicated that he could.

104. Student B was even more distractible than was Student A. He needed even more re-direction and prompting. Both boys reacted negatively to changes in routine.

105. Ms. Bates found that the academic skills of both boys were far lower in February 2011, when she first started working with Students, than what was reported in Students' December 2009 IEP's. Ms. Bates was surprised at both Students' goals because the goals indicated that the boys' abilities were much higher than what she was seeing.

106. For reasons not explained at hearing, during the time from February 2011 to the end of the 2010-2011 school year in early June, 2011, Students did not receive all of the SAI hours to which they were entitled when combining the 270 minutes per week of services from their November 2010 IEP's with the approximately 97 hours TES calculated as compensatory education.

107. After working with Students for a few months, Ms. Bates began to believe that the special education services they were receiving were inadequate for them. Students' deficits reminded her of the type of deficits faced by children who were generally placed in special day class programs, not 270 minutes a week pull-out resource programs such as what she was providing to Students. Because of the compensatory hours provided to Students, Ms. Bates was providing them with at least double the amount of SAI hours provided for in Students' November 29 IEP's. Ms. Bates was particularly concerned that once she completed the 97 hours of compensatory education hours provided to Students, the decrease to the hours called for in their IEP's would fall far short of what they required to address their deficits.

108. Sometime in early May 2011, Ms. Bates began communicating her concerns to Ms. Tappan, who was her supervisor. Ms. Tappan encouraged Ms. Bates to continue communicating with Ms. Clause and with Mother. Ms. Bates communicated her concerns to Ms. Clause. However, neither Ms. Tappan nor Ms. Clause suggested that IEP meetings be convened to discuss Ms. Bates' concerns or to discuss modifying Students' IEP's. Nor did they suggest increasing Students' SAI time. Ms. Bates did not communicate her concerns to Mother.

#### *Related Services for Speech and Language and Occupational Therapy*

109. TES was not able to provide speech and language services to Students until approximately January 27, 2011. TES was not able to contract with an SLP to provide on-site speech and language services to Students. TES therefore started providing the services by video conferencing. Video conferencing services are accepted by a national speech and language accreditation board as an appropriate means of providing services. However, TES could not provide a licensed SLP for the online services. Rather, TES provided a speech language pathologist assistant to provide the online services to Students. This assistant was supervised by Ms. Tappan.

110. TES continued to have difficulties providing speech language services to Students during the entire spring 2011 school semester. TES was not able to provide any speech and language services to Students, even by video conferencing, after mid-April 2011. Keegan did not attempt to contract with another provider and did not request Temecula to provide staff after TES could not. As addressed more fully below, Students' expert witness, speech language pathologist Lynne Hardy-Lukes, assessed Students in May 2012. She found that Students had failed to progress in language and communication from where they had been when assessed by Temecula in 2008. Ms. Hardy-Lukes opined that the gaps in services for Students had a detrimental effect on their ability to progress and was one of the reasons for their lack of measurable progress.

111. The Districts offered no testimony to contradict that of Ms. Hardy-Lukes. Ms. Tappan could not address Students' progress because she did not provide services to them and did not assess them. Although TES administered a speech and language assessment to Students in November, 2011, that assessor did not testify at the hearing.

112. Although Keegan, through TES, began providing occupational therapy to Students in December, 2010, it also stopped providing those services to Students in mid-April, 2011. However, Students presented no evidence at hearing, other than the fact that the services had not been provided until December 2010, and then stopped in April 2011, to address Students' occupational therapy needs. Although Keegan, through TES, administered an occupational therapy assessment to Students in November 2011, the therapist who administered the assessment did not testify at the hearing. Nor did Students present the testimony of an independent expert to address their OT needs. Therefore, there is no evidence in the record, other than the failure to implement all of Students' required OT sessions that addresses Students' OT deficits or how the failure to provide all required OT sessions impacted Students.

#### *ESY 2011*

113. As stated above, Students' November 29, 2010 IEP's provided them with ESY for summer 2011. In May, 2011, Mother had a discussion with Ms. Bates concerning the extent of services Students would receive for ESY. Mother asked Ms. Bates if it was necessary for Students to receive occupational therapy and speech and language therapy over the summer. Mother expressed to Ms. Bates that she wanted Students to have a summer break.

114. Ms. Bates informed Mother that Students' related services could cease temporarily over the summer as long as Students' IEP's were amended. Mother agreed to the amendments and agreed to effectuate the amendments without holding a formal IEP meeting. Mother and Ms. Bates signed an IEP amendment on May 25, 2011, deleting Students' OT and speech and language during the summer.

115. The May 25 IEP amendments also modified the amount of SAI ESY hours Students would receive. Rather than receiving four weeks of ESY as stated in their November 29, 2010 IEP's, Mother and Ms. Bates decided that Students would receive 20 hours of ESY over up to a two-week period of time, to be determined by Mother and Ms. Bates. Ultimately, Students received intensive SAI services delivered by Ms. Bates to just the two boys over a one-week period in June, shortly after the Keegan regular school year ended.

116. Mother's recollection at hearing did not coincide with that of Ms. Bates. Mother believed that Ms. Bates or Ms. Clause had suggested deleting the related services over the summer. However, Ms. Bates' testimony was more persuasive. Ms. Bates acknowledged that TES did not have on-site services providers available for the summer, but stated that the online providers would have been able to provide the services. Ms. Bates' recollection of events concerning Students was consistently very clear and she gave specific testimony about this IEP amendment process as well. Additionally, there was no reason for her to have testified to the contrary. Further, the IEP amendment itself supports Ms. Bates' recollections. Finally, Ms. Bates' recollection is also supported by the fact that Mother had enrolled Students in a six-week Lindamood-Bell intensive reading course, which began

around the first week of July 2011. Had Students continued to receive ESY per the original language of their November 29 IEP's, those services would have conflicted with the LMB classes. Ms. Bates' recollection that Mother requested the decrease in ESY services for Students is therefore the more persuasive.

*Lindamood-Bell Instruction Summer 2011*

117. Mother won a raffle in spring 2011 that provided free testing of Students by Lindamood-Bell, which is a non-public agency providing intense individualized instruction to children with academic and learning deficits. Kristin Orphan, an LMB assistant director who testified at the hearing, explained that LMB, which has 50 private learning centers nationwide, provides direct one on one instruction for children over age four. The instruction seeks to develop the underlying sensory cognitive functions that support literacy and language development. The program was founded in the 1960's by Nancy Bell, who has a master's degree in education and was a reading specialist, and Patricia Lindamood, who was a speech language pathologist. The LMB program is research based and has been validated by research studies. Clinicians who provide direct services to children receive 80 hours of training. The clinicians are then mentored and supervised for three months.

118. There are three reading and language programs offered by LMB: LIPs, Seeing Stars, and Visualizing and Verbalizing. The LIPs program targets phonemic awareness and sequencing sounds in words. It focuses on articulation and how the mouth moves to produce sounds. The Seeing Stars program focuses on symbol imagery and the auditory processing of sounds and visual imagery. The Visualizing and Verbalizing program focuses on oral and written language comprehension.

119. Students' Parents were able to fund 114 hours of LMB services for Students in July and August 2011. LMB used the Seeing Stars program with both boys. They received six hours a day of individual instruction over an approximate four weeks of time. According to Ms. Orphan, Student A progressed a bit faster than did Student B.

120. LMB assessed Students on April 6, 2011, some months before they took the LMB classes, and on August 15, 2011, right after Students stopped receiving instruction. LMB administered several standardized assessments as well as some tests developed in-house by LMB. The standardized tests consisted of the Peabody Picture Vocabulary Test – IV, Form A (Peabody); the Detroit Tests of Learning Aptitude, Word Opposites, Verbal Absurdities, and Oral Directions subsets (Detroit); the Woodcock Reading Mastery Test – NU, Form G (Woodcock); the Slosson Oral Reading Test – R3 (SORT); the Wide Range Achievement Test – 4, Form Blue (WRAT); and the Gray Oral Reading Test 4, Form A (GORT). The in-house testing consisted of the LMB Conceptualization Test -3; Informal Tests of Writing; and a Symbol Imagery Test.

121. Some of the tests LMB administered were out-of-date editions. Also, LMB did not provide across-the-board scoring for all standardized tests. For example, some test scores included raw scores, standard scores, percentiles, mental age scores, and grade level

scores (e.g., the Peabody). Other tests only provided scores in some of those areas. For example, the Detroit score for verbal absurdities only included raw scores and a score for mental age.

122. The LMB scores indicate progress in some areas for Students and not in others. Student A's scores on the Peabody increased from third to the seventh percentile. His score on the Detroit – absurdities went from a raw score of zero to a raw score of two. His score on the Detroit – oral directions, went from a raw score of eight to a raw score of 11. Student A's scores on the word attack subtest of the Woodcock assessment increased from the sixth percentile to the 10th percentile. On the WRAT, Student A's word reading subtest score increased from the one-tenth percentile to the first percentile. His score on the spelling subtest of the WRAT increased from the two-tenths percentile to the first percentile.

123. Although Student A's raw scores on the Slosson increased, he remained below the first percentile. LMB had not been able to administer the GORT to Student A on April 6, 2011 because Student A just could not do the test at all. When LMB administered the GORT on August 15, 2011, Student A produced zero responses in all areas except in passage recall and comprehension. Student A's scores decreased on the word opposites subtest of the Detroit.

124. On the assessments developed by LMB, Student A's scores on the Conceptualization Test decreased from the third to the second percentile. His scores increased on the symbol to sound assessment, remained the same in nonsense spelling, and increased on the symbol imagery assessment.

125. Student B's LMB assessment scores showed similar fluctuation. His scores on the Peabody increased from the 16th to the 19th percentile. His scores on the Woodcock word attack subtests increased from the first to the 12th percentile. Student B's scores on the WRAT word reading subtest increased from the one-tenth percentile to the first percentile.

126. Student B's LMB scores, however, remained static or decreased on several of the tests. His results on the Detroit – word opposites, and Detroit – oral directions both decreased by about 50 percent. His results on the Detroit – verbal absurdities remained the same: zero correct. Student B's scores on the Slosson remained below the first percentile. Similar to Student A, LMB was not able to obtain scores from Student B on the GORT during the April 6, 2011 testing. When LMB re-administered the test in August 2011, Student B's scores were also zeros in all subtests of the GORT except on the comprehension subtest, where he scored below the first percentile.

127. On the LMB-developed assessments, Student B's scores also increased on the symbol to sound test and remained the same (a zero) on the nonsense spelling subtest. His scores did increase from the second to the third percentile on the Conceptualization test. Although Student B's raw scores increased on the symbol imagery test, the scores were still below the first percentile.

128. Students therefore both progressed minimally in some areas according to the LMB assessment data. However, it is impossible to determine if these minor increases were due to the LMB intervention, as urged by Students and Ms. Orphan. LMB first assessed Students in early April, 2011. LMB re-assessed Students on August 15, 2011, immediately after they finished receiving instruction from LMB. Between the first assessment and the second, Students continued to receive their SAI services from Ms. Bates in the normal course of their schooling. They also received 20 hours of intensive SAI intervention over the summer from Ms. Bates immediately before they began the LMB course. It is therefore unclear which of these services was responsible for the minimal progress Students demonstrated.

129. Mother informed Ms. Clause that she was taking Students to get assessed by LMB in early April 2011. She did not inform Ms. Clause or any TES or Keegan staff of the results of the testing. She did not inform TES or Keegan staff when Parents ultimately decided to enroll Students in LMB during the summer of 2011. Ms. Bates did not learn of this until the fall 2011 semester started. Mother did not inform Ms. Clause or any Keegan or TES staff that she believed that Students required an intensive reading program during the summer of 2011, in addition to or in place of the ESY services Keegan was already going to provide. Mother did not inform anyone that she felt that instruction at Keegan was inadequate. Mother did not request Keegan to provide additional reading intervention for Students either during the spring of 2011 or the summer of 2011. Nor did she ever request Keegan to fund the Lindamood-Bell instruction or any other type of reading intervention program. Keegan staff only learned of Students' receipt of LMB instruction after it occurred.

130. Parents funded the LMB tuition through loans obtained by Mother's own parents. Mother is paying the loans. The LMB tuition for Student A was \$10,613.40. For Student B, the tuition was \$10,623.20.

#### *2011-2012 School Year*

##### *Fall 2011 Semester*

131. Ms. Bates was again assigned as Students' special education teacher for fall 2011. The semester began in late August 2011. Because Students had regressed during the summer, Ms. Bates began by re-teaching them material they had learned the previous school year. Most children regress somewhat during the long summer break; Students' regression was more significant than those of their same-aged peers. Student A demonstrated more regression than did Student B. Student B showed a bit of progress at the start of the new school year, particularly in his ability to pay attention. However, Ms. Bates explained that when she says that Student B showed "progress" it was relative because he was far behind where he should have been at the time.

132. During the spring 2011 semester, Ms. Bates had been able to cover approximately two reading lessons a week with Students because she was providing SAI services under Students' IEP's as well as providing the compensatory services. However,

when Students returned to school for the fall 2011 semester, their pace slowed to covering one lesson a week because Students were no longer receiving the compensatory education hours. Therefore, Ms. Bates was only providing instruction for 270 minutes a week. Students' progress slowed because of the decrease in hours. The TES records also indicate that Students did not receive about one-third of the required SAI minutes. It is unclear from the evidence why this happened. However, in spite of the decrease in minutes, Students provided no evidence that Ms. Bates failed to implement Students' IEP goals during the SAI instruction that was provided to them. Students also failed to provide evidence that their OT or SL providers failed to implement their goals either.

133. During this semester, Student A progressed minimally in math. Student B, who has more deficits in math, continued struggling in that area. According to Ms. Bates, Student B made no progress whatsoever in math during the fall 2011 semester.

134. Ms. Bates continued to believe that Students' IEP services were inadequate to meet their significant needs. She had previously spoken with Ms. Tappan and Ms. Clause about her concerns. In fall 2011, Ms. Bates began voicing her concerns to Mother about Students' lack of progress and need for additional services. Mother had become concerned as well. Mother asked Ms. Bates if Students' SAI minutes could be increased. Ms. Bates informed her that an IEP meeting would be needed in order to do so. Mother still had no thoughts at that time about removing Students' from Keegan and agreed with Ms. Clause's "wait and see" perspective that it was better to see how Students would do through the course of the semester.

135. Ms. Bates also contacted Melanie Hertig, a Temecula Assistant Director of Special Education, to voice her concerns about Students. Ms. Hertig has worked for Temecula for 14 years. Prior to assuming her present position, she worked as a special education program specialist for Temecula. In her present position, Ms. Hertig supports special education programs on different Temecula school sites. She is also the Temecula liaison to schools chartered by Temecula, of which there are now three. Ms. Hertig provides guidance to the charter schools should they have questions, particularly about special education issues. Ms. Hertig has a bachelor's degree in psychology and a master's degree in education. She was previously a credentialed teacher. Presently, she holds a pupil personnel services credential as a school psychologist and a Level 1 administrative credential. Ms. Hertig was an earnest and forthright witness. She evinced dedication as an educational professional. She did not evade confronting questions whose answers might be supportive of Students' legal position in this case.

136. Ms. Hertig agreed that Ms. Bates had contacted her soon after the start of the fall 2011 semester with concerns that Students were not progressing adequately. Ms. Bates did not tell her that Students were not progressing at all. Ms. Hertig therefore felt that instead of immediately convening an IEP it would be better to wait for Students' annual IEP in December which would also be their triennial IEP. Since the Districts would also have to administer triennial assessments to Students in preparation for their triennial IEP's, Ms. Hertig felt waiting for after test results were available would be more beneficial to Students



as the IEP teams would have additional information from which to make recommendations. Given the circumstances, Ms. Hertig's decision to wait for assessment results rather than convening an IEP meeting two months before Students' triennial IEP meetings were due was logical and reasonable.

137. On September 21, 2011, about a month after the start of the fall 2011 semester, Keegan presented Mother with an assessment plan for Students' triennial assessments. Mother returned the signed plans to Keegan two days later. Keegan administered an occupational therapy assessment, a speech and language assessment, and a psycho-educational assessment to Students. Since Students failed to present any persuasive evidence at hearing with regard to Students' deficits and unique needs in occupational therapy, neither Students' OT assessments nor allegations regarding failure to provide OT will be addressed in this decision.

138. Students presented evidence by means of the records maintained by TES, which were admitted as evidence in several forms at hearing, that they did not receive all required SAI hours during the fall 2011 semester. The records indicate that Students received about 34 hours less than they should have received pursuant to their November 29, 2010 IEP's. This amounted to a failure to provide them with approximately one third of their SAI hours. Students did receive almost all their speech and language sessions during this time. It was never clarified at hearing why the SAI hours were not provided.

#### *November 2011 Speech and Language Assessments*

139. Students were assessed in speech and language by Amy Verhoeven, a speech language pathologist with a master's degree who is employed by TES. Ms. Verhoeven did not testify at the hearing. Neither the Districts nor Students entered into evidence the assessment completed by Ms. Verhoeven for Student A. However, Student A's IEP team discussed the assessment results at his triennial IEP team meeting held on December 5, 2011. Ms. Verhoeven noted that Student A's two speech communication goals had only been partially met. She recommended breaking down his speech goals to increase success with individual target sounds. Student A's IEP team also noted that he only used correct and complete sentences with 40 percent accuracy when he spoke. Student A's IEP team also noted that Student had difficulty with word finding and that his expressive and receptive vocabulary were well below average. The team further noted that Student A was well below age expectations in the area of social communication skills.

140. The speech and language assessment completed by Ms. Verhoeven for Student B was admitted into evidence. Ms. Verhoeven's assessment included a review of Student B's records, observations of Student B in his classroom, and the administration of the following standardized assessments: the Expressive One-Word Picture Vocabulary Test (EOWPVT); the Receptive One-Word Picture Vocabulary Test (ROWPVT); the Comprehensive Assessment of Spoken Language (CASL); the Pragmatics Profile from the Clinical Evaluation of Language Fundamentals – Fourth Edition (CELF-4); and the Goldman-Fristoe-2 Test of Articulation (GFTA-2). Ms. Verhoeven also informally assessed Student

B's voice and fluency through her clinical observations of him in class and during her assessment.

141. Student B scored in the below average range on the EOWPVT. He scored in the low average range on the ROWPVT, indicating that he has more deficits in expression language than in receptive language. Ms. Verhoeven assessed Student B's general language abilities using the CASL. The subtests she assessed included antonyms, syntax construction, paragraph comprehension, non-literal language, and pragmatic judgment. Student B scored significantly below average in all areas. Ms. Verhoeven found that Student B's core composite of 60 on the CASL placed Student in a percentile ranking of less than one percentile, suggestive of a severe delay in his language skills development.

142. During her clinical observations of Student B, Ms. Verhoeven noted significant deficits in his sentence structure and patterns of words he used, particularly with regard to Student B's improper use of past tenses. Student B also had difficulty providing relevant background information when trying to describe an event to someone.

143. Student B's scores on the GFTA-2 placed him in the second percentile. He had a significant amount of articulation errors. His score indicated that Student B's articulation was significantly below average for a boy of his age.

144. Ms. Verhoeven assessed Student B's pragmatic language abilities through standardized testing and through her observations of him. The CELF-4 contains a pragmatic profile which Ms. Verhoeven provided to Mother and Student B's teacher, and a classroom aide for completion. Student B's scores ranged from 131 to 189. Because of this discrepancy, Ms. Verhoeven found that she could not make a comprehensive determination of Student B's pragmatic skills based on the CELF-4. However, Student B's score on the pragmatics subtest of the CASL had only been 69, indicating that his pragmatic judgment was significantly below average for his age. Based on her observations of Student B, Ms. Verhoeven agreed that Student B's pragmatic skills were below age level expectations.

145. Overall, Ms. Verhoeven found that Student B presented with severe language delays, severe articulation delays, mild fluency and voice deficits, and moderate pragmatic language delays. She found that Student B had relative strengths in receptive vocabulary and paragraph comprehension skills. Ms. Verhoeven only recommended that Student B receive 30 to 60 minutes a week of speech and language therapy in spite of the significant deficits she found.

#### *Psycho-educational Assessments*

146. School psychologist Eric Cox, a TES employee, administered the psycho-educational assessments to Students. Ms. Bates, however, administered the Woodcock Johnson academic achievement testing to both Students. Mr. Cox completed his assessment report for Student B on November 11, 2011, and his report for Student A on November 12,

2011. The scores from Ms. Bates' academic testing was integrated into the reports Mr. Cox wrote. Mr. Cox did not testify at the hearing.

147. Mr. Cox noted that the purposes of the assessments for both Students was whether they continued to qualify for special education services as Students with a handicapping condition and what were their current learning, behavior, and social/emotional needs and what strategies might be beneficial in assisting them.

148. Mr. Cox reviewed Students' medical histories and their educational histories, including state test scores and prior assessments. He interviewed Students and their teachers, and observed Students in class and during the assessment process. Mr. Cox administered the following standardized assessments to both Students: the Cognitive Assessment System (CAS); the Comprehensive Test of Nonverbal Intelligence (CTONI-2); the Beery-Buktenica Developmental Test of Visual-Motor Integration; the Adaptive Behavior Assessment System, Second Edition (ABAS-2); and the Woodcock-Johnson III Tests of Achievement (WJ-III).

149. In his assessment report, Mr. Cox explained that the CAS measures cognitive processing in the areas of planning, simultaneous processing, attention, and successive processing. Planning involves determining, selecting, applying and evaluating solutions to problems. Simultaneous processing involves integrating separate visual stimuli into a whole group. Attention involves focus on needed information while ignoring information not needed for the task. Successive processing involves remembering ordered auditory information.

150. Student A attained a score of 68 on the planning scale of the CAS, which is in the one point sixth percentile, suggesting that Student A's ability to plan, select, and apply solutions to problems was well below average. Mr. Cox was unable to compute a score for Student A on the attention scale because of Student A's struggle to read the names of colors as required on the expression attention portion of the attention subtest. On the number detection portion of the attention subtest, Student A scored a scaled score of one, indicating that he struggles to stay focused and avoid distraction. On the simultaneous scale, Student A's standard score of 79 indicated that he had a below average ability in functioning tasks that measure the ability to use nonverbal reasoning skills. Student A's highest score on a CAS subtest was an 89 on the successive scale, indicating that his ability to understand the serial order of spoken communication to process auditory information was in the low average range.

151. Mr. Cox explained in his report that the CTONI-2 is an intelligence test that uses a nonverbal format to estimate general intelligence of people whose performance on traditional intelligence tests might be adversely affected by subtle or overt impairments involving language or motor abilities. The CTONI-2 contains six subtests: pictorial analogies; geometric analogies; pictorial categories; geometric categories; pictorial sequences; and geometric sequences. Student A scored in the average range in pictorial categories, pictorial sequences, and geometric sequences. He scored in the below average

range in pictorial analogies and geometric categories. His score in geometric analogies was in the poor range. Student A's full scale composite score was 78, in the poor range. However, his pictorial scale composite score was 91, in the average range, while his geometric scale composite score was 70, in the poor range. Mr. Cox indicated that there was a clinically significant difference between Student A's geometric scale composite score and his pictorial scale composite score.

152. Mr. Cox explained that the VMI is a developmental sequence of geometric forms to be copied with paper and pencil. It is designed to assess the extent to which the test taker can integrate their eye-hand coordination. Student A's visual perception score on the VMI was 109, which is in the 73rd percentile, in the average range, and one of Student A's strengths. His score on the motor coordination subtest was a 69, in the very low range, and represented a weakness in Student A's ability to manipulate small objects.

153. Student A's standard score on the CAS was 89, indicating that Student A's ability to process auditory information was in the low average range.

154. The ABAS-2 is a checklist designed to measure adaptive skills functioning. Mother completed the scales for both Students. The ABAS-2 assesses skill areas in communication; community use; functional academics; home living; health and safety; leisure; self-care; self-direction; and social. Student A's global assessment score was 82, which is in the low average range.

155. The WJ-III contains subtests in 11 areas. In letter-word identification, Student A obtained a standard score of 47, indicating that his ability to synthesize unfamiliar words and recognize familiar words was within the very low range. Ms. Bates was unable to obtain a score for Student A on the reading fluency subtest. Passage comprehension measures the ability to understand the content of a written passage. Student A's score of 57 in passage comprehension was in the very low range. Calculation skills involve the computation of mathematical equations. Student A's score of 67 was in the low range. Math fluency measures skill in quickly computing simple addition, subtraction, and multiplication problems. Student A's score of 65 was in the very low range. Applied problems involve the understanding of mathematical concepts and the ability to use those concepts to solve problems. Student A's score of 59 was in the very low range of functioning. Writing samples entails organization and communication of ideas on paper. Student A's standard score of 50 was in the very low range of functioning. Student A scored higher in the word attack and picture vocabulary subtests of the WJ-III, scoring a 74 and 75, respectively. According to Mr. Cox's scales in his assessment report, both of these latter scores are also in the low range, albeit not as low as Student A scored on other subtests of the WJ-III.

156. Mr. Cox observed Student A in his classroom while Student A was working one on one with a teacher. He also observed Student A during the assessment process. In class, Student A was easily off-task and required frequent prompts to remain on-task. Although Student A attempted to answer the questions posed to him, he appeared lost with the discussion. He spoke in a very soft voice and squirmed in his seat. Student A initiated

conversation with Mr. Cox and appeared to enjoy social interaction as well as feeling comfortable with adults. Mr. Cox noted that Student A was working on an adapted curriculum and that his short attention span seemed to impact his performance. Mr. Cox also noted atypical sensory seeking behavior in Student A such as his jutting out his head, placing his chin on his paper, and blowing on his pencil as if to remove germs from it.

157. During the assessment process, Mr. Cox noted that Student A was social, friendly, and showed interest in others. As in the classroom, Student A had difficulty sitting still. He squirmed in his chair and sat by kneeling. He required frequent breaks during the testing. Student A often asked when the testing would be completed and remarked that he could not do the tests. He often had difficulty understanding the test directions. He needed multiple prompts to stay on-task and to complete test items. Mr. Cox opined that Student A may have been able to perform better on certain portions of the assessment if his attention and effort had been more consistent.

158. Mr. Cox determined that Student A appeared to meet special education eligibility under OHI, based upon Student A's suffering bleeding in the brain at birth, which Mr. Cox believed had played a significant role in Student A's subsequent development. Mr. Cox also found that Student A required a great deal of support in learning academic skills, including a modified curriculum and additional prompted to stay on-task. Mr. Cox ended his report by making recommendations for accommodations and interventions to assist Student A's success in the classroom. Mr. Cox did not make any recommendations with regard to placement or services for Student A.

159. Mr. Cox and Ms. Bates administered an almost identical psycho-educational assessment to Student B, including the use of the same standardized testing instruments. However, he observed Student B during a classroom discussion and during a snack period rather than in a one on one setting as he had with Student A. He observed Student B participating in the class discussion although Student B's teacher had to remind him often not to speak out of turn. Student B was also often off-task. During snack, Student B engaged in conversation with his classmates, but struggled to keep up with the pace of the conversation. Student B spoke in a soft voice and put his head down.

160. Mr. Cox also observed Student B during the assessment process. Student B freely engaged in conversation. He was pleasant and inquisitive, indicating to Mr. Cox that Student B was genuinely curious about others and things in the environment. Student B also had difficulty sitting in his chair; like Student A, Student B often squirmed while in the chair in a kneeling position. Student B also expressed that the tests were going to be difficult. He often asked for directions to be repeated. He required frequent prompts to remain on-task and had a tendency to fatigue easily. Student B performed best when given a break every 20 minutes. As with Student A, Mr. Cox commented in his report that Student B might have been able to perform better on certain assessments had his attention and effort been more consistent.

161. Student B attained a standard score of 62 on the planning scale of the CAS, which corresponds to the six-tenths percentile and the well below average range. Mr. Cox could not compute a score for Student B on the attention scale because Student B, like his brother, struggled with reading the names of colors as required on one of the subtests. This suggested to Mr. Cox that Student B struggles on tasks that require the ability to stay focused and avoid distraction. On the simultaneous scale of the CAS, Student B's standard score was 88, in the 21st percentile. This suggested to Mr. Cox that Student B was functioning in the low average range on tasks that measure the ability to use nonverbal reasoning skills. On the successive scale, Student B's standard score of 84 was in the 14th percentile, indicating that Student B's ability to understand serial order of spoken communication and to process auditory information was within the low average range. On the CAS successive scale, Student B's standard score was 103, indicated that his ability to process auditory information was well into the average range.

162. Student B's full scale composite score on the CTONI-2 was 86, in the low average range. It was higher than that of Student A. Additionally, Student B's composite score of 89 on the Geometric scale and composite score of 86 on the pictorial scale were much closer to each other than had been Student A's scores.

163. On the VMI, Student B's visual motor skills score was a 95, in the average range. His score of 94 on the visual perception portion of the test was a 94, also in the average range, indicating that Student B's visual perceptual abilities are a relative strength for him. However, Student B's score on the motor coordination portion of the test was 80, in the low average range, indicating that Student B has a weakness in his ability to manipulate small objects.

164. Mr. Cox also had Mother complete the rating scales of the ABAS-2 for Student B. Mother's ratings resulted in a global assessment score of 82 for Student B, the same score achieved by Student A. This score also placed Student B in the low average range of adaptive functioning. Student B's lowest scores were in communication, community use, functional academics, and self-direction, where his scaled scores were all four or below. Student B's scaled scores in home living, health and safety, leisure and self-care, were between 9 and 12, indicating relative strengths in those areas.

165. Student B's scores on the WJ-III were also a mixture of strengths and weaknesses. His letter-word identification standard score was 56, indicating that Student B's ability to synthesize unfamiliar words and recognize familiar words, was within the very low range. Student B's score on passage comprehension was only 21, much lower than the score attained by Student A. This score indicated that Student B's ability to understand the content of a written passage was in the very low range. His calculation skills produced a standard score of 71, in the low range. In math fluency, the ability to compute simple addition, subtraction and multiplication, Student B's score of 57 placed him in the very low range. His score of 71 on the applied problems subtest placed Student B in the low range. Student B's score on writing fluency was 53, in the low range. His writing samples score of 80, word

attack score of 77, and picture vocabulary score of 78, were all either in or close to the low average range, indicating relative strengths for Student B in those areas.

166. Mr. Cox found that overall, Student B's cognitive functioning fell within the low average range on tasks measuring nonverbal problem solving skills. His auditory processing skills also fell within the low average range. Mr. Cox found that Student B's areas of weakness included planning and attention were areas of weakness where Student B's scores were well below average in those areas. However, Student B's scores in sensory motor integration and visual perception fell within the average range. Mr. Cox found that Student B demonstrated considerable difficulty maintaining his focus and working independently. He found that Student B required multiple prompts and modified work in order to make progress. Student B's academic skills were all considerably below grade level.

167. Mr. Cox concluded that like Student A, Student B appeared to meet the eligibility criteria for special education and related services under the handicapping condition of OHI, based on Student B's health history which mirrored that of his twin. Mr. Cox concluded that Student B also required a great deal of support in learning academic skills, including a modified curriculum and additional prompting to remain on-task. Due to his tendency to become fatigued easily, Mr. Cox noted that Student B benefitted from frequent breaks and opportunities to leave his seat and move around the classroom. Mr. Cox therefore recommended the same classroom accommodations that he had recommended for Student A.

168. By the fall of 2011, Mother had begun expressing more repeated concerns to Ms. Bates about Students' lack of progress. Mother expressed frustration about working with Students because she did not know what to do with them to get them to learn and retain information. She was realizing that Students could not do the schoolwork, even in the modified and adapted form that she was presenting to them. Students were in general education more during the 2011-2012 school year than they had been the previous spring because they had finished their compensatory hours and were only receiving the 270 minutes a week indicated in their November 29 IEP's. Ms. Bates was therefore spending more time consulting with Mother and helping her with strategies. Mother also expressed to Ms. Bates that she had been unhappy with the SDC placement Students had attended previously at Temecula. Mother would sometimes suggest that Students' SAI minutes be increased.

*December 5, 2011 IEP's*

169. Keegan initially noticed Students' triennial IEP meeting for November 14, 2011. The date for the meetings had to be changed twice due to reasons not at issue in this case. Students' IEP meetings were ultimately held on December 5, 2011.

170. As noted above, Parents had not lived within the actual boundaries of the Temecula Valley Unified School District since the time Students began attending Keegan. They lived in a city contiguous to Temecula's boundaries and within Riverside County. Their home was within the boundaries appropriate for attendance at Keegan. Mother testified that she had informed various members of Keegan's staff of where the family was

living. In particular, Keegan's office manager, who was a friend of Mother's, knew where the family was living. Mother testified that the family's address was never at issue because the family was living within Keegan's boundaries. None of the Districts' witnesses contradicted Mother's testimony that Keegan was aware since the time Students enrolled at Keegan that they were not living within Temecula's service area.

171. Keegan did not note the address change on Students' IEP documents until it sent IEP notices to Parents for Students' triennial IEP meetings. The first notice sent had Students' old address in Temecula. The second and third notices had Students' new address. The notices indicated that the purposes of the IEP meetings were to hold Students' annual and triennial IEP meetings and to discuss possible changes to their placement and/or services. None of the notices indicated that a purpose of the meeting was to discuss the fact that because Students no longer lived within Temecula's boundaries it meant that they were no longer qualified to attend Keegan or that Keegan was no longer obligated to provide a FAPE to Students.

172. By the time the Districts began procedures to convene Students' triennial IEP meetings, Keegan and Temecula staff had begun to believe that Keegan might not be an appropriate placement for Students and that other placement options should be discussed. As noted above, Ms. Hertig had already communicated with Ms. Bates regarding Students' lack of progress. Keegan therefore invited Ms. Hertig to Students' triennial IEP meetings as a representative of Temecula, Keegan's chartering district, so that she could address placement possibilities at Temecula.

173. Temecula and Keegan both believed that it would be prudent to discuss placement options outside of Keegan. Both therefore wished to invite representatives from Students' new school district of residence to attend the meeting to discuss potential placement options there. Ms. Hertig testified that she checked Parents' address prior to the IEP meetings to determine their district of residency. She acknowledged that the issue of residency with regard to students whose charter school cannot meet their needs is a very gray area. Ms. Hertig stated that in her experience, when a charter school student's IEP team was going to recommend a placement outside the charter school, the charter school and its chartering district would look to the student's home school and/or school of residency to give the home district an opportunity to offer a placement. The intent was to ensure that an appropriate program was available for the student. In this case, although Students no longer lived within Temecula's boundaries, it was Temecula's intent to make a placement at one of their school sites available to Students if necessary, irrespective of where they lived.

174. Parents, however, refused to permit Temecula or Keegan to contact their new school district of residency. Parents did not want to waive confidentiality concerning Students and did not want the new school district to learn particulars about Students' unique needs. Therefore, no representative from the new district participated in Students' December 5, 2011 IEP meetings.



175. By the time of the December 5 IEP meetings, Students' OT assessments still had not been completed because TES had not been able to hire an occupational therapist. The OT assessments therefore did not meet legal timelines based upon the date Mother signed the assessment plan, which included the proposed OT assessments. The Districts sent Parents a written request for an agreement to excuse the occupational therapist from the triennial IEP meetings. Parents declined to sign their agreement to this.

176. However, Students presented no evidence at hearing, other than the fact that the OT assessment was not completed in a timely fashion and evidence that Students did not receive all required OT therapy sessions, in support of any allegations in their complaints concerning OT. No witness competent to address occupational therapy offered persuasive testimony regarding the implications of the late assessment or the implications of the failure to provide all OT therapy sessions to Students. No occupational therapist testified at hearing. Therefore, no competent witness testified to address Students' OT needs or what they lost because of the late OT assessment and failure to fully implement Students' OT therapy sessions.

177. Ms. Bates was the facilitator at the IEP meetings for both Students as well as the special education representative. Ms. Hertig participated as the LEA representative for Student A's IEP meeting but was unable to stay for Student A's meeting. Also attending the meetings were Mother and Stepfather, Ms. Clause, Ms. Tappan, Mr. Cox, Keegan's office manager who had recently received a counseling credential, and Students' new co-teacher for general education. This general education teacher did not testify at the hearing. It is unclear whether Ms. Verhoeven attended the meetings because she did not sign the IEP documents. Ms. Bates indicated at hearing that Ms. Verhoeven's assessments were discussed and that the SLP at the meeting recommended increasing Student's speech and language therapy from 30 minutes to 60 minutes a week. However, it is unclear whether it was Ms. Verhoeven or Ms. Tappan who made the recommendation.

178. At the IEP meetings, Parents presented several concerns they had for Students. They stated that they were concerned about the amount of SAI and related services Students were receiving. They expressed concern about the lack of provision of related services due to the failure of TES to retain the necessary therapists on staff. Parents also expressed concern about the lack of Students' progress, particularly in reading.

179. Mr. Cox suggested changing both Students' eligibility categories to OHI as the primary eligibility due to Students' health problems at birth, with a secondary disability of SLD based on the discrepancy between their cognition, especially nonverbal, and their academic achievement scores. All team members agreed with the change.

180. At Student A's IEP meeting, the team members present discussed Student A's lack of progress on his goals. Ms. Bates was alarmed at the lack of progress. She raised concerns to the IEP team because Student A did not make the progress she believed he should have over the course of the school semester. He was responding much less to interventions she implemented than she had expected. She indicated at the hearing that she

was aware after three weeks of teaching Student A that he was functioning fairly low in all areas. At the IEP meeting on December 5, Ms. Bates indicated that Student A had not been able to meet his goals because the goals in his November 29, 2010 IEP were written at too high a level for him. He progressed slightly in his ability to read CVC words. He also progressed slightly in math. Ms. Bates believed that Student A's inability to remain focused and attentive greatly contributed to his lack of progress. She stated the same during her testimony at hearing.

181. Student A's IEP team noted his results on his assessments. The team also noted that Student A's scores on classroom assessments was very low. On a testing instrument called the Dibels, Student A's scores indicated that his reading was at risk. His score on the statewide CST English language arts section was below basic. On the MAPS assessment, Student A was low in all areas of reading. On the SRA's corrective reading decoding program, Student A had increased his knowledge of CVC words and the sound of letters but had not met his previous comprehension or decoding goals. He remained at SRA level A, the very beginning level of that portion of the program, although he had advanced to level B on the reasoning and writing portion of the SRA program. Level A is equivalent to the first part of Kindergarten.

182. Ms. Bates noted to Student A's IEP team that he was able to write a simple three to five word sentence if given a bank of words and the opportunity to re-read the words several times. However, she also noted that Student A still had to ask what each word meant. Student A, who was almost half way through fifth grade at the time, still could not do any independent writing and was easily frustrated by his inability to form words correctly.

183. Student A's November 29, 2011 IEP had contained 10 goals. His IEP team on December 5, 2011, noted that Student A had not fully met any of them. Student A had partially met his speech and communication goal, his speech-communication development goal, and his math functions goal. He had not met at all his goals in reading, writing, math coin identification, math word problems, math days of the week identification, or in reading CVC words. Since Keegan still had not assessed Student A in OT, it was unclear whether he had met his OT goal.

184. Student A's December 5 IEP team developed 12 goals for him. Unlike the goals his team had developed the previous year, the goals developed on December 5 were based on actual present levels of performance obtained from standardized assessments and classroom progress. While the baselines of the goals were not worded with exact precision, reviewed in conjunction with Student A's present levels of performance his goals indicated adequate baselines. They were based on a review of his progress the previous year and a global review of his results on standardized assessments and classroom testing. While the baselines were not perfect, they addressed Student A's present needs, permitted his teachers to know the scope of the goals they would need to work on, and indicated an adequate means of determining if Student A made progress on the respective goals during the course of the year.

185. Student A's IEP team developed two reading goals for him in decoding high frequency words, reading comprehension, and writing. The team wrote a writing goal based on his present difficulty in writing sentences. The team wrote four math goals for Student A in identifying money, identifying numbers, learning concepts of time, and doing multiplication. The team wrote five language goals for him. Two were in the areas of articulation, one in the area of communicating stories, one to address Student A's expressive and receptive language deficits, and one to address his pragmatic deficits. These goals sufficiently addressed all of Student A's known deficits and unique needs. The only goal not addressed was in occupational therapy since Student A had not yet been assessed in that area.

186. The Districts' IEP team on December 5, 2011, covered the same general areas with regard to Student B's IEP. The main difference with Student B's IEP meeting was that Ms. Hertig was present as the LEA representative for the entire meeting.

187. Student B's IEP team discussed his assessment scores and his scores on classroom assessments. Although Student B had differences from Student A on his psycho-educational and speech and language assessments, his classroom assessment scores on the Dibels, the MAPS, and the SRA were almost identical to those of Student A. The language on Student B's present levels of performance page of his IEP is almost identical to that of Student A.

188. Student B's IEP team noted that he too had only partially met his two communication development goals and his math regrouping/math function goal. The team noted that Student B, like Student A, had failed to meet his goals in reading comprehension and reading decoding, writing, math-money identification, math step functions, and math-days of the week.

189. Student B's December 5 IEP team also developed 12 goals for him. Unlike the goals his team had developed the previous year, the goals developed on December 5 were based on actual present levels of performance obtained from standardized assessments and classroom progress. While the baselines of the goals were not worded with exact precision, reviewed in conjunction with Student B's present levels of performance, his goals indicated adequate baselines. They were based on a review of his progress the previous year and a global review of his results on standardized assessments and classroom testing. While the baselines were not perfect, they addressed his present needs, permitted his teachers to know the scope of the goals they would need to work on, and adequately gave a basis for determining if Student B made progress on each goal.

190. Student B's IEP team developed two reading goals for him in decoding words, reading comprehension, and writing. The team wrote a writing goal based on his present difficulty in writing sentences. The team wrote four math goals for Student B in identifying money, identifying numbers, doing multiplication, and in concepts of time. The team wrote five language goals for him. Two were in the areas of articulation, one was in the area of communicating stories, one to address Student B's expressive language deficits, and one was to address his pragmatic deficits. These goals sufficiently addressed all of Student B's

known deficits and unique needs. The only goal not addressed was in occupational therapy since Student B had not yet been assessed in that area.

191. Ms. Bates stated to both Students' IEP teams that she believed Students required an SDC placement. She believed that it should be a combined placement of half the time in a mild to moderate SDC classroom to address Students' social abilities, which were fairly good, and a moderate to severe SDC classroom to address their significant academic deficits.

192. Keegan's charter school model did not include any SDC classes. However, SDC classrooms were available at Temecula. After discussion of possible placements for Students, including remaining at Keegan, the Districts offered Students identical placements. They offered to place Students in an SDC classroom at a Temecula school site for 300 minutes a day. In recognition of the significant language deficits identified in Students' speech and language assessments, the Districts proposed increasing Students' speech and language therapy to 50 times year for 30 minute sessions, an increase over the once a week sessions provided in Students' previous IEP's.

193. The IEP offers did not specify the name of the school where Students would attend classes. It did not state whether the proposed SDC was a mild to moderate or moderate to severe SDC. However, at hearing Ms. Hertig explained that Temecula only has three types of SDC classes: autistic specific SDC's, which were not appropriate for Students; severely handicapped SDC's, also not appropriate for Students due to their higher cognitive levels; and general SDC's. Ms. Hertig stated that Temecula does not have specific SDC classrooms identified as "mild to moderate" or "moderate to severe." She explained that had Temecula offered Students either an autistic specific SDC or a severely handicapped SDC, which it did not, those SDC's would have been specifically identified on Students' IEP's. The SDC designation that was stated on Students' IEP's was therefore a specific type of SDC at Temecula.

194. At hearing, Ms. Hertig explained that the general SDC classrooms at Temecula elementary schools had small class sizes, typically six to a maximum of 12 students. She stated that the SDC classes were language enriched, and that the classrooms used visuals to prompt students who required visual support. She explained that there was generally one to two aides in the class in addition to a special education teacher so that the students to adult ratios were very low. Based upon her experience and knowledge of Temecula's SDC programs, Ms. Hertig believed that a general SDC classroom at a Temecula elementary school would be able to meet Students' extensive needs.

195. The IEP offers to both Students were for a one-year period, starting on December 5, 2011, and concluding on December 5, 2012. Since the IEP offers covered an entire year, the IEP's would take Students from approximately mid-fifth grade to mid-sixth grade. Temecula Valley Unified School District elementary schools only go to fifth grade. Sixth grade students promote to middle school. Therefore, the IEP's proposed at Students' December 5, 2011 IEP meetings would have covered Students in middle school for sixth

grade had Parents agreed to the IEP's. However, in spite of this fact, none of the Districts' IEP team members discussed Students' transition to middle school or what type of programming was available at the middle school level. Nor did the team members discuss if there were any differences in the SDC classrooms at middle school as compared with elementary school.

196. The December 5, 2011 IEP's did not offer ESY to Students. It was the Districts' position during the IEP meeting that Students did regress over the summer, but that since they had significant difficulty recouping their lost academic abilities, it was pointless to offer ESY. It is unclear what the legal basis is for this conclusion and the Districts did not pursue this argument in their closing brief. As discussed below, the Districts changed their position during summer 2012 and eventually offered ESY hours to Students in accord with their November 29, 2010 IEP's, as amended in May 2011. However, it is abundantly clear from the records and testimony in this case that Students absolutely required some type of ESY services in order to stem the flow of their regression during the long summer break.

197. Parents did not ask any many questions or make many comments during the December 5, 2011 IEP's for either of the twins. They did not ask specific questions about the SDC placement, perhaps because they were already familiar with Temecula's SDC's based on Students' prior attendance there. They did not offer any suggestions or make requests for specific placements. When Districts' IEP team members asked questions in an attempt to ascertain what Parents wanted for Students in terms of placement and/or services, Parents only stated that they wanted more SAI minutes. They made no other suggestions or requests for placement or services. They did not ask for the specific name of the school site where Students would attend the SDC if accepted by Parents. They did not request to observe the SDC classroom.

198. Parents did not sign the proposed December 5, 2011 IEP's.

199. Keegan convened amendment IEP meetings for Students on December 14, 2011. The purpose of the meetings was to review Students' OT assessments and the two proposed OT goals. The OT assessment was not reviewed by any witness at hearing and is not in evidence. No witness testified as to the proposed OT goals or to the OT services recommended by the occupational therapist. Parents did not consent to the OT goals or services at this amendment meeting.

### *Spring 2012 Semester*

200. On February 24, 2012, by email from Mother to Ms. Clause, Parents accepted the goals and related services proposed in the December 5 and December 14 IEP's so that Keegan could implement them. Mother also requested that Students' SAI minutes be increased to 180 minutes a day. The Districts never agreed to increase the SAI minutes. They offered no explanation for their refusal to do so. Parents have never agreed to the SDC placement proposed in Students' December 5, 2011 IEP's.

201. Keegan laid Mother off from her job as a general education teacher sometime in January 2012. Ms. Clause explained that Keegan had financial issues at the time and could no longer afford to employ Mother. Ms. Clause began supplementing the general education teacher who remained teaching Students' general education classroom.

202. Ms. Bates was promoted to an administrative position at TES during the spring 2012 semester. Another TES special education resource specialist teacher replaced her as Students' special education teacher for the remainder of the 2011-2012 school year. The new teacher continued to implement Students' new IEP goals.

203. Ms. Clause scheduled another amendment IEP meeting for both Students on March 22, 2012 to clarify what was appropriate schoolwork for them. In an email to Mother, Ms. Bates indicated that Keegan wanted to offer Students "a deal." The scope of this "deal" was never explained to Parents and the "deal" never materialized.

204. Prior to the March 22, 2012 amendment IEP meetings, Parents requested the Districts to provide speech and language and psycho-educational independent educational evaluations (IEE's) to Students. The Districts agreed to fund the IEE's.

205. Ms. Clause, Mother, Ms. Bates, and Students' general education teacher attended the March 22 IEP amendment meetings. In addition to discussing the IEE's, the teams discussed the challenge of meeting Students' needs at Keegan. Mother requested that the 300 minutes of SAI offered in the December 5, 2011 IEP's be implemented at Keegan. The Keegan IEP team members explained that Keegan did not have SDC classes and therefore Keegan could not agree to Mother's request.

#### *Students' Expert Witnesses*

##### *Psycho-educational IEE by Dr. Weckerly*

206. Dr. Jill Weckerly administered a psycho-educational IEE to Students on March 27, April 3, and May 17, 2012. She testified at the hearing as one of Students' expert witnesses. Dr. Weckerly has an impressive educational and professional background. She has a bachelor's degree in linguistics from the University of California, Berkeley and a master's degree in linguistics from the University of California, San Diego (UCSD). She earned a doctorate of philosophy in the area of cognitive science and linguistics from UCSD in 1995, and a second doctorate of philosophy in the area of clinical psychology from both UCSD and San Diego State University in 2000. Her area of specialty is clinical neuropsychology. Dr. Weckerly has been licensed by the California Board of Psychology since 2001. She has also been an assistant adjunct professor at the UCSD Department of Psychiatry since 2002.

207. Dr. Weckerly has been the recipient of several awards and grants. She has also been the author or co-author of some 14 peer-reviewed articles as well as several other publications. Dr. Weckerly additionally has given approximately 20 presentations in a

variety of areas touching on different aspects of psychology, particularly that of children and adolescents. Many of her publications and presentations focused on language issues and attention issues in children.

208. As a psychologist, Dr. Weckerly has been a clinical evaluator and clinical psychologist in the private sector, having maintained a private practice since 2001. She divides her professional time equally with employment as a school psychologist for the San Diego Unified School District in that school district's Mental Health Resource Center. As a school psychologist, Dr. Weckerly performs diagnostic consultation, supervises assessment teams, works with teachers and school staff, and performs assessments. In her private practice, Dr. Weckerly also provides therapy to patients as well as performs neuropsychological assessments, including IEE's at the request of both parents and school districts. In addition, Dr. Weckerly's professional history of supervised clinical experience is long and impressive.

209. Dr. Weckerly was a persuasive witness. Her credentials and experience are impressive. As discussed below, her assessments of Students were comprehensive as was her review of Students' records. Her testimony at hearing was precise and non-evasive. She did not present as an advocate for Students; rather she presented as a school psychologist who was concerned that Students were regressing rather than progressing academically. She spent considerable time assessing Students and exploring their significant deficits. The Districts inexplicably did not offer any expert witnesses of their own and offered no persuasive testimony to contradict Dr. Weckerly's findings or conclusions regarding Students' unique needs or what their placements should be. Indeed, Mr. Cox, the school psychologist who administered Students' triennial psycho-educational assessment, did not testify at the hearing. The Districts do not argue that Dr. Weckerly's assessment was incorrect or contained omissions. Dr. Weckerly also readily admitted gaps in her assessment. For example, as discussed below, she did not observe the SDC placements proposed by Temecula and therefore agreed that she could not address whether the SDC could meet Students' needs. Dr. Weckerly's testimony was therefore entitled to substantial weight.

210. Dr. Weckerly thoroughly reviewed Students' educational records and medical histories, including their prior assessments. She observed Students in their classrooms at Keegan, administered several testing instruments, and interviewed Mother. Ultimately, her findings were similar to those of Mr. Cox. However, where Mr. Cox made no placement recommendations, Dr. Weckerly gave specific parameters of what she considered to be an appropriate placement for Students.

211. Dr. Weckerly observed Student A in his class at Keegan on May 17, 2012. Student A was first seated with the approximately 26 children in his class. The class covered several grades. The class then broke up into small groups; Student A, who was in fifth grade at the time, was directed to go with the five children in the third grade group. One teacher worked with the six children. After doing some calisthenics, Student A's class used clocks for an exercise in telling time. Student A was able to correctly tell that it was midnight on the clock; he was not able to correctly identify eight o'clock. The teacher began an exercise

in which she asked students to suggest something they knew that was easy about telling time. Student A did not appear to understand the question. The teacher continued to explain how to tell time correctly; Student A began coloring and continued to do so throughout the remainder of the lesson, even after the teacher handed out a worksheet where the students were supposed to fill in the correct time above pictures of clocks. Student A finally began doing the worksheet when prompted by his teacher. The teacher orally simplified the lesson so that Student A could understand it.

212. Student A was unable to do the lesson independently when the teacher left him to help other students. When Student A asked some classmates for assistance, they ignored him. The teacher eventually returned and had to prompt Student A through the entire assignment. Student A did not appear to understand her explanation as to what the different clock pictures signified. Student A took much longer to finish the worksheet than did the other students. He only answered correctly with significant assistance from his teacher.

213. When the teacher moved on to another worksheet assignment, Student A continued to color. The teacher then had to prompt him through the entire assignment. Dr. Weckerly noted that Student A appeared to have great difficulty with the language involved in time concepts, but she was not able to gauge from her observation whether that was due to lack of language comprehension, comprehension at the conceptual level, or both.

214. Dr. Weckerly also observed Student A during her assessments of him. She noted that he was friendly and engaged throughout the testing. He tried hard but often appeared not to understand directions and he tired easily. Like Mr. Cox, Dr. Weckerly noted that Student A constantly squirmed and wiggled in his chair.

215. Dr. Weckerly noted that Student A's speech was notable for many articulation and grammatical errors. He spoke in short utterances with simple grammatical structure, but she could understand his speech. Student A also struggled with receptive language. Dr. Weckerly had to repeat things to him often and he displayed delays in responding to most verbal tasks.

216. Dr. Weckerly administered the following assessment tools to Student A: the WISC-IV; the Wechsler Individual Achievement Tests-3 (WIAT-3); the GORT-4; the Comprehensive Test of Phonological Processing (CTOPP); the Test of Word Reading Efficiency, Second Edition (TOWRE-2); the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2); the Behavior Rating Inventory of Executive Function (BRIEF); a parent response on the Child Symptom Inventory (CSI); and a San Diego ADHD project identification packet.

217. Dr. Weckerly described Student A's levels of performance on each assessment tool using a range from very superior to severely impaired. The scores she obtained on her assessments were commensurate with the scores obtained by previous assessors who had tested Student A, including the scores obtained by Mr. Cox in his assessment administered some six months before Dr. Weckerly administered her testing. Based on the discrepancies



in his scores, Dr. Weckerly, like Mr. Cox, found that an overall estimate of Student A's current intellectual functioning was less meaningful due to the discrepancies. The Districts do not dispute the validity of Dr. Weckerly's test results.

218. Dr. Weckerly, who is a clinical psychologist, was able to make diagnoses of both Students. She determined that Student A suffered from a Cognitive Disorder, Not Otherwise Specified, with severe deficits in language, working memory, and processing speed, likely secondary to the perinatal strokes Student A suffered at birth. Dr. Weckerly's determination in that respect was similar to the conclusions reached by Mr. Cox. The primary difference, not at issue here, is that Dr. Weckerly found Student A's eligibility to be traumatic brain injury rather than OHI.

219. Dr. Weckerly diagnosed Student A with ADHD, a reading disorder, a disorder of written expression, and a mathematics disorder. She found that he had severe deficits in verbal intellectual functioning but that his nonverbal intellectual and perceptual reasoning were higher. Student A's working memory and processing speed were also severely impaired.

220. Dr. Weckerly concluded that the combination of Student A's severely impaired language, working memory, and processing speed are inter-related because the acquisition and mastery of language for Student A is hampered by his poor working memory and processing speed. She found that Student A's language deficits made it difficult to measure his other cognitive abilities, including many aspects of nonverbal reasoning. Dr. Weckerly further found that it was logical to expect Student A to have difficulty with academic skills because of his profound language deficits.

221. However, Dr. Weckerly further found that in spite of Student A's severe deficits, there were a number of indications that aspects of cognitive functioning important in learning were relatively intact. She pointed to Student A's higher scores on measures of rote learning on the WRAML-2, which were in the lower end of the average. She found that this suggested that Student A has raw verbal memory abilities important in mastering academic skills.

222. Dr. Weckerly also surmised, based on Student A's scores on certain measures, that his academic scores were much lower than expected. She concluded that Student A's low academic skills and slow progress was based on aspects of inattention, which would explain his weak visual memory skills. Dr. Weckerly concluded that taken together, Student A's combination of deficits in language, working memory, visual memory, and processing speed combined to pose a significant challenge for Student A, leading to his becoming overwhelmed and frustrated.

223. Dr. Weckerly also observed Student B in his class at Keegan on May 17, 2012, the same class attended by Student A. Student B was also placed in the group of six students at the third grade level. Unlike Student A, Student B did not interact at all with the other students. He left the class a couple of times to go to the bathroom; the first time he did not

return for 10 minutes. When Student B returned from his bathroom break, he had a difficult time tuning into the class; he fidgeted and appeared to be daydreaming. Although he appeared to try to engage in the tasks the teacher was covering, Student B appeared to have a hard time doing so.

224. Student B often appeared not to understand the teacher's questions, even one as simple as where his pencil was. During the lesson regarding telling time, even with prompts from the teacher, Student B was often not engaged. Student B stood up at one time during the teacher's oral lesson. He sat down when the teacher gave him a worksheet assignment to do, but did not turn his attention to the worksheet. Rather than begin the work, Student B again asked to go to the bathroom.

225. When Student B returned again from the bathroom, his teacher began individually working with him to get him engaged in the worksheet assigned. She was successful in getting Student B to concentrate on the work until she stepped away to assist other children. Student B then drifted off, began fidgeting, and stared straight ahead for several minutes. Several times, the teacher returned to assist Student B. He would engage with her and try to do the lesson. However, as soon as the teacher turned her focus on another child, Student B drifted off. He would not focus on the assignment unless the teacher remained at his side prompting him. Student B was not able to answer any of the teacher's questions regarding the time shown on the clocks pictured on the worksheet. He had difficulty conceptualizing number amounts and did not appear to understand the time concepts at all.

226. Dr. Weckerly also observed Student B during her assessments of him. As with Student A, she noted that Student B was friendly and engaged throughout the testing. He tried hard but was easily frustrated and came close to tears at a few tasks. He gave up easily or would say he did not know answers on many verbal tasks; Dr. Weckerly attributed this to Student B's difficulties with receptive language. His attention was sustained as long as direct interaction or conversation was maintained. On independent tasks, Student B required some prompting but he would readily return to the work. However, Student B was often fidgety and restless. He would often stand up to do tasks and appeared to rush through work.

227. Dr. Weckerly noted the same language problems with Student B's speech that she noted with Student A: his speech was notable for many articulation and grammatical errors. He spoke in short utterances with simple grammatical structure, but she could understand his speech. Student B also struggled with receptive language. Dr. Weckerly had to repeat things to him often and he displayed delays in responding to most verbal tasks.

228. Dr. Weckerly administered the same assessment tools to Student B that she had administered to Student A. She also described Student B's levels of performance on each assessment tool using a range from very superior to severely impaired. The scores Dr. Weckerly obtained on her assessments were commensurate with the scores obtained by previous assessors who had tested Student B, including the scores obtained by Mr. Cox in his triennial assessment from November 2011. Based on the discrepancies in Student B's

scores, Dr. Weckerly, like Mr. Cox, found that an overall estimate of Student B's current intellectual functioning was less meaningful due to the discrepancies. The Districts likewise do not dispute the validity of Dr. Weckerly's test results for Student B.

229. Dr. Weckerly's diagnostic impressions of Student B were identical to her impressions of Student A: She determined that Student B also suffered from a Cognitive Disorder, Not Otherwise Specified, with severe deficits in language, working memory, and processing speed, likely secondary to the perinatal strokes Student B suffered at birth. Dr. Weckerly's determination in that respect was similar to the conclusions reached by Mr. Cox. Dr. Weckerly also found Student B's primary eligibility to be traumatic brain injury rather than OHI.

230. Dr. Weckerly also diagnosed Student B with ADHD, a reading disorder, a disorder of written expression, and a mathematics disorder. She found that he had severe deficits in verbal intellectual functioning but that his nonverbal intellectual and perceptual reasoning were higher. Student B's working memory and processing speed were also severely impaired.

231. Dr. Weckerly also concluded that the combination of Student B's severely impaired language, working memory, and processing speed are inter-related because the acquisition and mastery of language for Student B is hampered by his poor working memory capacity and slow processing speed. She also found that Student B's language deficits made it difficult to measure his other cognitive abilities, including many aspects of nonverbal reasoning. Dr. Weckerly further found that it was logical to expect Student B, like Student A, to have difficulty with academic skills because of his profound language deficits.

232. Dr. Weckerly concluded that Student B's ongoing very impaired scores on measures of academic skills, all of which were below the first percentile, and his slow progress were, as with Student A, likely due to attention issues. Student B attained relatively strong scores in perceptual reasoning compared to other areas of intellectual functioning. This indicated to Dr. Weckerly that his scores on measures of visual memory were weaker than might be expected. She concluded, as she had for Student A, that taken together, Student B's combination of deficits in language, working memory, visual memory, and processing speed combined to pose a significant challenge for Student B, leading to his becoming overwhelmed and frustrated.

233. Dr. Weckerly came to the same conclusion for both Students: that they were severely delayed in their acquisition of academic skills, beyond what their cognitive profiles and history of interventions would suggest. She found that given the severity of Students' language deficits, intensive speech and language intervention was crucial. Dr. Weckerly concluded that Students required a program that integrated language practice and instruction into classroom activities. She found they needed intensive individual and/or small group instruction for core academic subjects with multimodal instruction with frequent reinforcement and ample opportunities for breaks. Dr. Weckerly also recommended that Students needed accommodations in the classroom and modifications to the curriculum

similar to what Keegan had included in its IEP's developed for both Students in 2010 and 2011.

234. Dr. Weckerly opined at hearing that Keegan was an inappropriate placement for Students. She noted that they both required intensive special education instruction and could not be educated in a general education environment. While she commended the efforts of Students' teacher to prompt and re-direct them, she felt that a general education teacher did not have the requisite skills to address Students' significant deficits. Dr. Weckerly stated that only a full-time special education environment with teachers trained to integrate language instruction into the daily lessons would be able to address Students' deficits and allow them to progress academically and to acquire better language skills.

235. Dr. Weckerly was not requested by Parents to observe any of the SDC classrooms at Temecula so she did not do so. Nor has she had occasion to observe any Temecula SDC under other circumstances. Dr. Weckerly therefore could not give an opinion as to whether an SDC at Temecula would meet Students' needs. However, she was very adamant that only a language-rich classroom with a small student to teacher ratio would permit Students to progress academically.

236. Dr. Weckerly is familiar with the Newbridge School, a certified non-public school in San Diego County where Students presently attend school. It was she who recommended the school to Parents based upon her familiarity with Newbridge's new program which offers a language-rich classroom setting with a student class size of not more than five students. Dr. Weckerly believes that the Newbridge program is an ideal fit for Students.

*Speech and Language Assessment by Lynne Hardy-Lukes*

237. Lynne Hardy-Lukes is a speech language pathologist in private practice. She has a master's of science degree in communication disorders from the University of Texas. She is licensed in California and has national certification as well.

238. Ms. Hardy-Lukes administered IEE's in speech and language to Students in April and May 2012. She reviewed their records, interviewed Mother, administered standardized tests and informal language probes, and observed Students at school at Keegan and during the testing process. Ms. Hardy-Lukes was not asked to observe a Temecula SDC classroom.

239. Ms. Hardy-Lukes observed Students during their specialized academic instruction and during a snack break. There were a total of three or four students in the class. Student A was very distractible and needed many prompts to stay on task. He was sociable with the other students. He told Ms. Hardy-Lukes that he often "walked around trying to find the nice people."

240. Ms. Hardy-Lukes observed Student B to be much less interactive than Student A. He needed more one on one direction and needed more cues and prompts. He was very inattentive during class. During snack time, Student B was less talkative than Student A. In class, he was even more distracted than his brother. Student B did not listen or participate in the class lesson. He was not focused. At snack time, other students tried to engage with him, but Student B ignored their overtures.

241. During her assessment of Students, Ms. Hardy-Lukes found both boys to be very interactive and interested in engaging with her. They sometimes asked too many questions and needed many cues and frequent breaks after only 10 to 15 minutes of testing.

242. Ms. Hardy-Lukes findings regarding Students were very similar to those of Dr. Weckerly and the findings made on Students' triennial assessment. She concluded that Students both had significant articulation issues. They had expressive language deficits, made grammatical errors and errors in syntax and word order. Students' errors would be noticeable to others listening to their speech.

243. Ms. Hardy-Lukes administered the following assessments to Students: the Expressive Vocabulary Test, the Peabody Picture Vocabulary Test, and the CELF-4. Student A scored in the below average range on all the assessments. His best scores were on the Expressive Vocabulary Test, where he scored a 70, which placed him in the second percentile, and on the Peabody, where Student A scored an 80, placing him in the 12th percentile. His composite scores on all subtests of the CELF-4 were below the first percentile.

244. Student B scored higher on these tests than did Student A. His Expressive Vocabulary Test score was 77, in the sixth percentile. His score on the Peabody was 86, which placed Student B in the 18th percentile. Student B's scores on the CELF-4 ranged from below the first percentile to the fifth percentile.

245. Overall, Ms. Hardy-Lukes concluded that Students presented with moderate to severe speech disorders. These disorders interfered with their communication abilities. She found that Students had severe language disorders affecting their abilities in semantics, syntax, morphology, and/or pragmatics. Ms. Hardy-Lukes found that Students had moderate voice disorders characterized by persistent deviations of quality, pitch, or loudness.

246. Ms. Hardy-Lukes recommended that Students receive two, 30-minute sessions a week of individual speech and language therapy sessions. She also recommended that they have one, 30-minute group speech and language session a week to address their pragmatic language deficits. She made recommendations for goals in 13 different areas.

247. At hearing, Ms. Hardy-Lukes was asked by Students to review the speech and language goals and the speech and language services offered in Students' November 29, 2010 IEP's. Ms. Hardy-Lukes opined that she found no justification for reducing Students' speech and language goals and their speech and language therapy. She stated it was

particularly unsupported in Students' case because they had not met their prior goals. The Districts offered no testimony to contradict that of Ms. Hardy-Lukes. As discussed above, neither Ms. Tappan nor Ms. Clause had any recollection at hearing as to why they had recommended decreasing Students' speech services and reducing the number of their speech goals.

248. As mentioned above, Ms. Hardy-Lukes also stated at hearing that the failure to provide speech and language services to Students during much of their two years at Keegan affected Students' progress on their goals since Students needed consistency in order to prevent regression.

249. The Districts provided no testimony or other evidence that contradicted Ms. Hardy-Lukes' opinions. The Districts did not present the testimony of any speech language pathologist or other language professional to support their objections to Students' issues regarding their speech and language needs.

250. Ms. Hardy-Lukes and a colleague for the Temecula Valley Therapy Services agency, where Ms. Hardy-Lukes is employed, have provided speech and language services to Students since Ms. Hardy-Lukes assessed them. They were still providing the services at the time of this hearing. Ms. Hardy-Lukes testified that Students are both progressing on their speech and language goals. She did acknowledge that the services her agency provides Students are medically based and require authorization from an ear, nose and throat medical specialist before the services could be provided. Ms. Hardy-Lukes also stated that her services are generally given as a supplement to SL services provided by school districts. Students provided invoices for their outside speech and language services indicating that Parents' out of pocket costs for the services through October 15, 2012, totaled \$1,015 for Student A and \$995 for Student B.

#### *May 30, 2012 IEP Meetings*

251. Mother requested that the Districts convene an amendment IEP meeting so that Students' IEP teams could discuss the results of Dr. Weckerly's and Ms. Hardy-Lukes' independent assessments. Mother also wanted to discuss placement options based on the findings and recommendations made in the IEE's. The Districts agreed to convene an IEP meeting on May 30, 2012. It was a joint meeting for both Students.

252. Attending the May 30 IEP meeting were Mother, Stepfather, Father, Ms. Clause, Students' general education teacher, Students' resource specialist teacher from Keegan, an occupational therapist from TES, Dr. Weckerly, and Ms. Hardy-Lukes. Ms. Hertig had also been invited to the meeting to represent Temecula. However, at the last minute she had a conflict and could not attend. No representative from Temecula appeared in place of Ms. Hertig.

253. Ms. Hardy-Lukes reviewed her assessments of Students. The team reviewed the few discrepancies between her assessments and that of previous assessors. The team also

reviewed her test findings, the 13 goals Ms. Hardy-Lukes recommended for each Student, and her recommendations for services. Based upon Ms. Hardy-Lukes' assessment and the discussions at the IEP meeting, Students' IEP team proposed adding four new goals to their IEP's. The team also proposed increasing Students' speech and language therapy sessions to the 90 minutes per week recommended by Ms. Hardy-Lukes.

254. Dr. Weckerly then reviewed her assessments of Students along with her recommendations.

255. The IEP team proceeded to discuss placement options for Students and whether the SDC proposed in their December 5, 2011 IEP's was still appropriate. Ms. Hardy-Lukes believed that there would be 30 or more students in a Temecula middle school SDC, which she believed was highly inappropriate for Students. However, Ms. Hardy-Lukes had not observed an SDC classroom and therefore her perception of Temecula's SDC's was incorrect.

256. Students' special education teacher discussed her belief that Keegan's program that provided pull-out SAI instruction to Students, was not appropriate for Students in spite of the accommodations instituted and the modifications made to their curriculum. She stated that Students were unable to produce the work necessary in order to succeed in the Keegan program.

257. Although not indicated in the IEP meeting notes, Dr. Weckerly discussed her recommendation that Students be placed at the Newbridge School. She explained its language-rich learning environment, small class size, and individualized instruction from trained special education teachers. The Districts' IEP team members did not pursue her recommendation.

258. Although the IEP team at the May 30 meeting wanted to discuss placement offers other than the SDC offered in Students' December 5 triennial IEP's, it was unable to do so. No Temecula representative attended the meeting to describe or offer any alternative placements that might have been available at Temecula. The Keegan team members informed Parents that they could not offer placement and services outside of Keegan.

259. The absence of a Temecula representative at this meeting was particularly egregious because, had Parents accepted a Temecula placement, Students would have transitioned to middle school. Ms. Hertig acknowledged during her testimony that the general SDC classes at Temecula middle schools consisted of 12 to 18 students. Ms. Hertig acknowledged that had she attended the May 30 IEP meeting, she would not have recommended Students be placed in a general SDC at the middle school level. Rather, she would have recommended that they be placed in one of Temecula's "bridge" programs, an SDC program for special education students in sixth grade who would benefit from a program that was somewhere between a general SDC and a severely handicapped SDC. At hearing, Ms. Hertig explained that the bridge SDC's generally have no more than nine

students, with three to four adults in the classroom, giving the classes a very small student to adult ratio.

260. Because no representative from Temecula attended the May 30 IEP meeting, there was no one who was familiar with Temecula's bridge program, or any of the other programs that might have been available to offer to Students. The Keegan IEP team therefore continued to offer the general SDC placement to Students. Parents continued to reject the offer.

#### *Summer 2012*

261. As stated above, Students' December 5, 2011 IEP's did not provide ESY instruction for summer 2012.

262. In late June 2012, based upon Dr. Weckerly's recommendation, Parents contacted the Newbridge School to explore enrolling Students there, at least for the summer session.

263. Newbridge Director Stephen Mayo testified at the hearing. Mr. Mayo has both general education and special education teaching credentials. He is also trained in a variety of instructional methods including Orton-Gillingham, Slingerland, and Lindamood-Bell. He is on the Board of the International Dyslexia Association. Mr. Mayo has been the Director at Newbridge for 17 years. He ran another private school for children with disabilities before opening Newbridge. In addition to his administrative duties, Mr. Mayo drafts IEP goals, attends IEP meetings, and sometimes teaches classes at Newbridge.

264. Newbridge's original educational program consisted of classes with a maximum of eight children. Its original program was designed for students with language based disabilities who were not severely impacted. Mr. Mayo stated that the goal of the school is to transition students back to mainstream programs. Newbridge has full time SLP's on staff who work directly in the classroom so that language is imbedded in the curriculum. Newbridge does not accept students with behavior problems.

265. Mr. Mayo reviewed Students' IEP's and their assessments from Keegan and the private assessors. He concluded that Students would not have been able to keep up with the original Newbridge programming; Newbridge actually turned away 70 percent of applicants either because the school was not appropriate for them or because of lack of space. However, in the spring of 2012 Newbridge had started a companion program at what was called the Cooning Center. The program was designed for children who had greater deficits than the children for whom the original Newbridge program was designed. The Cooning Center program offers more support, a five student maximum per class limit, more speech and language services and more speech integration in the classroom, and a much slower pace than the Newbridge program. There is a special education teacher and one to two aides assigned to each classroom. Students receive two speech and language therapy sessions a



week in addition to the language services imbedded in the general curriculum. Mr. Mayo believed that the Cooning Center program would be a precise fit for Students.

266. Parents enrolled Students at the Cooning Center for its six week summer program. The first five days of their attendance was considered a trial period; had Cooning determined that Students were not appropriately placed there, Students would not have been permitted to remain and their tuition would have been refunded to Parents.

267. The Cooning Center program proved to be appropriate for Students and they were permitted to remain enrolled for the summer session, which started on July 2, 2012.

268. Parents did not initially inform Keegan or Temecula that they intended to enroll Students at the Cooning Center for the summer. However, Parents felt compelled to do so because the Districts had failed to provide Students with ESY instruction for summer 2012.

269. However, the Districts reconsidered their position regarding Students' need for ESY services based upon the fact that Students' IEP amendments from May 2011 offered ESY services to Students. Those IEP's were still in force as Students' stay put IEP's since Parents had not fully agreed to the IEP's offered on December 5, 2011. Ms. Hertig telephoned Mother on Friday, June 29, 2012, to offer ESY to Students at a Temecula school site. Temecula's ESY, which lasted approximately four weeks, had already been in session for about two weeks at the time Ms. Hertig offered the ESY placement to Students. That meant that Students would have to join a class already in session and would only attend half the program. Temecula reasoned that this was an appropriate offer because Students' previous IEP's had only provided for two weeks of ESY at Keegan.

270. At the time Ms. Hertig contacted Mother to offer ESY at Temecula, Parents had already enrolled Students for the summer program at the Cooning Center. However, Parents still agreed to consider the Temecula SDC ESY class. They asked to observe the proposed classroom.

271. In letters to Mother dated July 3, 2012, Temecula, through Ms. Hertig, readily agreed to the observation by Parents. Temecula also asked Mother to agree to attend IEP meetings for Students to discuss the outstanding IEP offers after the Temecula fall semester started in August 2012. Ms. Hertig provided Mother with three dates after the start of the semester as options for the meetings.

272. Stepfather observed the proposed SDC for ESY. Parents were not happy with it. Mother wrote a letter to Ms. Hertig on July 9, 2012, informing her that Mother did not believe the ESY placement was sufficient for Students. Mother informed Ms. Hertig at this time that she was placing Students in a summer program of Mother's choice and that she retained her rights to seek reimbursement from Temecula for the cost of the program. Mother did not state what she found insufficient in the Temecula ESY program and she did not identify the summer program she had chosen for Students.

273. At hearing, Mother stated that Stepfather had been dissatisfied with the SDC at Temecula because he observed children misbehaving and having “meltdowns” that were uncontrolled by staff. When he requested to review the reading program being provided to the students, no one was able to provide him with what the program was or if one was being used. Also, Stepfather was told that there were a total of 12 students in the class, which Mother felt was too large for Students. By the time Mother sent this letter to Ms. Hertig, Students had attended the Cooning Center for a week and had just passed their five-day probation period.

274. Students successfully attended the full summer session at the Cooning Center. Parents had to transport Students from their home in Riverside County to Cooning, which is located in San Diego County. The cost of the summer session was \$1,750 per child. Parents claim mileage costs of \$3114.22 for ESY 2012, based upon two round trips a day to the Cooning. However, Mother acknowledged at hearing that she did not always make two round trips a day during the summer session. Often, she would remain near the school. Mother could not offer a precise number of times she made two round trips a day.

#### *Fall School Semester 2012*

275. Mother re-enrolled Students in Keegan for the fall semester by filling out the necessary enrollment documents and emailing them to Keegan on August 1, 2012. She re-sent the enrollment papers by fax on August 13, 2012.

276. On August 3, 2012, Mother sent a letter to Ms. Clause notifying her that she disagreed with Keegan’s offer of FAPE for Students. Mother stated that Students required a language-based program with very small group instruction to address their needs. Mother stated that she planned to unilaterally place Students in a non-public school and would thereafter seek public funding for the placements.

277. Mother informed Ms. Clause after re-enrolling Students for fall 2012 that the family would be on vacation when classes started at Keegan. Mother requested study packets for Students. Ms. Clause provided the packets as requested. Students did some of the assignments, which Mother sent to Keegan.

278. In her cover letter to Ms. Clause dated August 20, 2012, returning some of the assignments completed by Students while they were on vacation, Mother informed Ms. Clause that pursuant to her August 3, 2012 letter stating Mother’s intent to privately place Students, Mother was confirming that as of August 20, 2012, Students were enrolling in the nonpublic school and would not be returning to Keegan.

279. The Districts interpreted Mother’s August 20, 2012 letter as notification that Students were disenrolling from Keegan and that Keegan therefore had no further responsibility to provide a FAPE or other educational placement to Students.

280. On August 21, 2012, Ms. Clause informed the Superintendent of Students' school district of residence that as of that date Students had been disenrolled from Keegan Academy Charter School.

281. Parents never responded to Ms. Hertig's offer to convene IEP meetings for Students after the start of the fall 2012 semester.

282. Neither Keegan nor Temecula contacted Parents to attempt to convene an IEP meeting for Students after Mother notified Ms. Clause of her intent to privately place Students.

283. The IEP's offered to Students by the Districts on December 5, 2011, covered a year period of time, from December 5, 2011, to December 5, 2012. Parents had accepted those portions of the IEP's addressing goals and related services. Parents had not accepted the offered placement. The placement identified in Students' previous IEP's, dated November 29, 2010, were therefore still ongoing and valid as Students' stay put placements.

284. The Newbridge fall semester, including instruction at the Cooning Center, began approximately August 20, 2012.

285. As of the hearing, Students continued to attend the Cooning Center. The tuition is \$1,600 per month for each boy. Students presented documentary evidence at hearing indicating that Parents had paid a total of \$4,800 in tuition for each boy, for a total of \$9,800. Mother carpools with another family from Riverside County whose child is attending Newbridge. Parents are therefore only asking for mileage reimbursement to Newbridge for one round-trip a day. Parents claim mileage costs of \$1,946.39 through October 15, 2012, and ongoing mileage costs for 100.2 miles a day at \$.555 per mile.

286. According to Mr. Mayo, Students have been successful in their placement at the Cooning Center. He stated that they were functioning at a pre-school to Kindergarten level when they first arrived. He stated that they are making slow but steady progress. The Districts offered no evidence to rebut Mr. Mayo's testimony regarding Students.

287. The evidence supports a finding that the Cooning Center is an appropriate placement for Students. Cooning is part of Newbridge, which the Districts do not dispute is a certified non-public school. According to the uncontroverted testimony of both Dr. Weckerly and Mr. Mayo, Cooning provides classrooms with a maximum of five students. The classes are taught by a special education teacher with the assistance of at least one aide. Students are provided with two sessions a week of speech and language therapy. Speech and language concepts are also imbedded in the class curriculum. The curriculum is presented at a pace appropriate for children with significant deficits such as Students. Dr. Weckerly was the one who first recommended Newbridge because she felt that its educational model would provide Students with the meaningful educational benefit that she felt they could not obtain at Keegan. The only evidence offered by the Districts in support of their argument that Cooning is not appropriate for Students is the fact that there are no mainstreaming

opportunities for Students at the school. However, the requirement for reimbursement of a private placement is only that it be appropriate, not that it be optimal.

## LEGAL CONCLUSIONS

1. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Students have the burden of proof in this proceeding with respect to the issues raised in Students' due process hearing request.

### *Elements of a Free Appropriate Education (FAPE)*

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)<sup>9</sup> A FAPE means special education and related services that are available to the student at no charge to the parent or guardian that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Federal Way School District* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1212-1213 (*Hellgate*); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. District v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

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<sup>9</sup> All statutory citations to the Education Code are to California law, unless otherwise noted.

4. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be objectively reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U.S.C. § 1401(9).) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207. See also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006), 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232).

5. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119; *E.S. v. Independent School District, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School District* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School District v Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School District v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.) The issue is whether the IEP was appropriately designed and implemented and is reasonably calculated to provide a student with a meaningful benefit. (*Rowley, supra*, 458 U.S. at p. 192; *Adams, supra*, 195 F.3d at p. 149; *Fresno, supra*, 626 F.3d at p. 439.)

#### *The IEP*

6. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. District No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d (1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

7. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives,

related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

8. Whether a student was denied a FAPE is determined by looking to what was objectively reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*).) The relevance of a student's subsequent performance to the adequacy of his IEP is limited. In *Adams*, parents who had supplemented their child's education with private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The District Court found it impossible to sort out the progress the child made.

9. The Ninth Circuit, however, rejected that approach. It stated that instead of asking whether the IFSP was adequate in light of the student's progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey a meaningful benefit to the student. The court rejected the process of measuring an IFSP (and, by analogy, an IEP) retroactively by its results. Instead of judging the IFSP in hindsight, the proper analysis was to look at the IFSP's goals, placement and services at the time the plan was developed and ask whether the methods were reasonably calculated to confer the student with a meaningful benefit. The court stated that the IFSP was a snapshot, not a retrospective, and had to take into account what was and what was not objectively reasonable when the snapshot was taken. (*Ibid.*) Although this analysis is generally applied to a student's argument that an IEP did not provide him or her with a FAPE because there is later evidence that the student did not make adequate progress, the argument is equally applicable to cases where a district argues that it offered a FAPE by pointing to the fact that the student later made progress irrespective of whether the IEP itself was appropriate at the time it was developed.

10. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate...." (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must be called when the "pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

### *Procedural Aspects of FAPE*

11. An IEP must be both procedurally and substantively valid. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*).) Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. District* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; *Ford v. Long Beach Unified Sch. District* (9th Cir. 2002) 291 F.3d 1086, 1089.)

### *Related Services*

12. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School District v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

### *ANALYSIS OF ISSUES*

*Issue 1: Did Temecula and Keegan Deny Students a FAPE during the 2010-2011 School Year ?*

*Issue 1(a): Alleged failure to implement Students' December 3, 2009 IEP's from August 23, 2010, through November 29, 2010.*

13. To provide a FAPE a district must deliver special education and related services "in conformity with" a Student's IEP. (20 U.S.C. § 1401(9).) A material failure to implement an IEP violates the IDEA. *Van Duyn v. Baker Sch. Dist 5J* (9th Cir. 2007) 502 F.3d 811, 821-822 (*Van Duyn*).) Since the IDEA defines a FAPE as special education and related services that ...are provided in conformity of the child's IEP, "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid*; see also *Savoy v. District of Columbia* (D.D.C. 2011) 844 F.Supp.2d 23, 31.)

14. However, the materiality test is not a requirement that prejudice be shown: "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn, supra*, 502 F.3d at p. 822; *Wilson v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 270, 275; see also *Sumter County School District 17*

v. *Heffernan* (4th Cir. 2011) 642 F.3d 478, 481, 485-486 [failure to provide more than 7.5 to 10 hours weekly of applied behavior analysis, out of a promised 15 hours a week, was material failure].)

15. Students enrolled at Keegan, a charter school that was chartered by Temecula in 2009, for the fall 2010 school semester. Students were part of Keegan's initial student contingent for Keegan's first year of operation. Students' parents had enrolled them at Keegan after being assured by Sonja Clause, Keegan's Principal and one of its founders, that Keegan would be able to implement Students' IEP's. Students' then current IEP's, dated December 3, 2009, provided Students with 240 minutes a day of specialized academic instruction in a special day class, 50 sessions a year of speech and language therapy, and 20 sessions a year of occupational therapy. Students had significant deficits in every academic area as well as significant deficits in articulation, expressive and receptive language, and pragmatics. Students' prior school had developed 15 goals for them in their then current IEP's to address their deficits, and had placed Students in an SDC program because they could not progress academically in the general education environment. (Factual Findings 1-40, 45-68).

16. There is no dispute that Keegan did not have any special education teachers or related service providers on staff. There is no dispute that Keegan originally expected Temecula to provide special education and related services to Keegan's students who had IEP's but that Temecula failed to provide Keegan with that support. There is no dispute that Keegan had to arrange for special education providers itself by contracting with TES, a non-public agency, and that the services were not available as of the time that Keegan held Students' annual IEP on November 29, 2010. The evidence showed that none of Students' general education teachers were capable of implementing Students' IEP goals or even attempted to do so. Students received none of the special education and related services required by their IEP's during this time frame. They were, for all intent and purposes, treated as if they were general education students who had never been found eligible for special education. Since Students received absolutely none of the services required by their IEP's, and since Keegan did not address Students' goals at all, there is no question that it failed to materially implement Students' IEP's. (Factual Findings 49-68; Legal Conclusions 1-16.)

17. The Districts, however, argue that Keegan did not illegally fail to implement Students' IEP's. The Districts' first argument is based on its theory that Keegan, as a charter school, is a "school of choice" that Parents voluntarily selected for Students. The Districts argue that Keegan was not required to implement Students' IEP's faithfully because the Keegan educational model did not include provision for special day classes as required by Students' IEP's. The Districts argue that the only type of specialized academic instruction that Keegan was therefore required to provide was pull-out services for a few hours a week, not full-time SAI instruction as required by Students' IEP's. The Districts appear to also argue that as a charter school of choice, it was also not required to provide Students with the related services required by their IEP's. The Districts' position in this regard is not supported by either federal or state law. (Factual Findings 45-68; Legal Conclusions 1-17.)



### *Charter School Responsibility and Conflict of Laws*

18. A charter school must admit students from all areas within California. (“... admission to a charter school shall not be determined according to the place of residence of the pupil, or of his or her parent or legal guardian, within this state ... .”) (Ed. Code, § 47605, subd. (d)(1).) A charter school must admit all students who wish to attend, if they meet admission criteria and there is room. If there is insufficient room, then admission is by lottery. (Ed. Code, § 47605, subds. (d)(2)(A)-(B).) No student can be compelled to attend a charter school. (Ed. Code, § 47605, subd. (f).) When a student leaves a charter school, for any reason other than graduation, the charter school is required to notify the superintendent of the school district of the student’s last known residence. (Ed. Code, § 47605, subd. (d)(3).)

19. Children with disabilities who attend public charter schools and their parents retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a) (2006).)<sup>10</sup> A charter school that is a public school of an LEA must serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools. (*Id.*, subd. (b)(1)(i).)

20. Although the charter schools have been granted independence in order to develop unique educational models, the California Legislature did not intend that the charter school statutes override or conflict with special education law. Education Code section 47646, subdivision (a), provides in pertinent part that a child with disabilities attending a charter school shall receive special education instruction “in the same manner as a child with disabilities who attends another public school of that local educational agency.” It also imposes on the chartering LEA the duty to ensure that “all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program” and is in compliance with the IDEA and its regulations. (*Ibid.*)

21. It is basic to statutory construction that statutes are to be harmonized if possible. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) An implied repeal of one statute by another may be found “only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are ‘irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.’ ” (*id.* at p. 477, quoting *In re White* (1969) 1 Cal.3d 207, 212.)

22. Since the power of an ALJ to order relief in an IDEA matter is grounded in federal law, it prevails over conflicting state law. (U.S. Const., art. 6, § 2.)

23. The Districts are correct that there is an inherent conflict between the concept of flexibility in programming and freedom from regulation that are the bases of the existence of charter schools, and the requirements under the IDEA and the Education Code that

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<sup>10</sup> All references to the Code of Federal Regulations are to the 2006 edition.

children with disabilities be served at the charter schools in the same way they would be served at a regular public school of the LEA. However, given that charter schools are creatures of state and not federal statute, the legal requirements of the federal IDEA prevail over any arguments Districts make based on state law concerning charter schools.<sup>11</sup> (Factual Findings 45-68; Legal Conclusions 18-23.)

24. The Districts argue in the alternative that Keegan did, in fact, implement Students' IEP's. The Districts point to the fact that Keegan provided small group instruction and individualized attention to all of its students including Students. Students also received some specialized reading intervention instruction from Ms. Clause. The Districts equate Keegan's educational model to the special education required by Students' IEP's.

25. First, the Districts' argument fails to address the fact that Students received absolutely no SL or OT services whatsoever during the three and a half month before their November 29, 2010 IEP meetings. The failure to receive those services, in and of itself, constitutes a material failure of implementation. (Factual Findings 45-68; Legal Conclusions 1, 13-25.)

26. Second, the Districts' failure to provide Students with the provisions of their IEP's amounted to exiting Students from special education without parental consent and without assessing Students to determine whether they continued to qualify for IEP's. The Districts' argument is substantially weakened by the fact that Students, who were in fourth grade when they enrolled at Keegan, had reading, writing, and math skills somewhere at or below the Kindergarten or first grade level. The argument is even less persuasive in light of the fact that Students failed to make any meaningful progress during the time they were at Keegan. This is demonstrated by the fact that by the time Keegan held Students' triennial IEP meetings on December 5, 2011, Students had failed to fully meet any of their goals. As of the time Students enrolled at their present nonpublic school, their skills were still at or below the Kindergarten level. (Factual Findings 8-40, 69-87, 93-108, 131-199, 206-250, 286.)

27. Students have therefore met their burden of proof that the Districts materially failed to implement their December 3, 2009 IEP's from August 23, 2010, to November 29, 2010, resulting in a denial of FAPE to Students. (Factual Findings 8-40, 69-87, 93-108, 131-199, 206-250, 286; Legal Conclusions 1-27.)

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<sup>11</sup> See, e.g. Garda, *Culture Clash: Special Education in Charter Schools* (2011) 90 North Carolina L.Rev. No. 3, 2012.

*Issue 1(b): Failure to have one of Students' special education teachers and an appropriate local educational agency (LEA) representative at the IEP meetings convened on November 29, 2010, January 24, 2011, and February 3, 2011*

*Required Attendees at IEP Team Meetings*

28. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (d) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

29. The special education teacher "of the pupil" does not have to be the child's current teacher. Federal law requires that the special education teacher or provider who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP. The Ninth Circuit has held that the special education teacher or provider should be one who has actually taught the child. But it need not be a present special education provider. (See *R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 940 (*Napa Valley*).)

30. As of the date of the IEP meetings in question, Keegan had not implemented Students' IEP's. There was therefore no person at Keegan who had ever provided special education or related services to Students who could attend the IEP meetings. The two special educators who did attend, Ms. Tappan and Ms. Garcia, had never provided services to Students. Indeed, neither woman had ever met Students. Under the Ninth Circuit's decision in *Napa Valley*, Keegan could have instead contacted any of Students' *former* special education teachers or providers from Temecula and asked that one attend Students' IEP meetings. No one on Students' IEP teams thought to do so. The Districts therefore committed a procedural violation of the IDEA by failing to have a special education teacher or provider that had ever taught Students attend the IEP meetings. (Factual Findings 56-87; Legal Conclusions 1, 11, 13-30.)

31. The question then becomes whether the failure to have an appropriate special education provider at the IEP meetings resulted in a loss of educational opportunity for Students or impeded the right Students' parents to participate in the IEP process, or if the procedural violation only amounted to harmless error.

32. While the failure to have a special educator at a student's IEP meetings who is familiar with their needs may not always be in error, in this situation, the failure was detrimental to Students' education and Mother's right to participate in the development of Students' IEP's. Students' IEP teams did not have access to Students' November 2009 IEP documents and no one had been providing special education services to Students. Therefore, Students' IEP teams had no idea what Students' present levels of performance were. As discussed above, Students' IEP teams used two year old levels of performance to both state where Students were presently functioning and to determine the services to be offered to them. Without even knowing Students' actual levels of functioning, Students' IEP teams between November 29, 2010, and February 3, 2011, decided to reduce Students' IEP services, even though there was no evidence Students had met their goals or had progressed to a point where a decrease in services was warranted. Had a prior special education provider attended Students' IEP meetings, a discussion of how they had been functioning the previous semester might have influenced the IEP teams to continue Students' present level of services. (Factual Findings 56-89.)

33. Further, Mother depended on the recommendations of Keegan's special educators since she had no special education background herself. Had anyone been present who could have properly addressed Students' actual level of functioning and make recommendations based upon Students' actual needs rather than based on two year old IEP's, Mother might not have acquiesced so readily to the reduction in Students' IEP services. Her ability to participate in the IEP process was impeded by the failure to have anyone present that was capable of addressing Students' deficits and their unique needs. (Factual Findings 41-44, 56-87.)

34. Students' therefore have met their burden of proof that the failure to have a special educator at their IEP's who had provided services to them amounted to a procedural violation that was more than harmless error. (Factual Findings 41-44, 56-87; Legal Conclusions 1, 11, 13-34).

35. Students also allege that their IEP teams were not properly constituted because Ms. Clause, who attended as the administrative designee, was not knowledgeable about the availability of Temecula's resources of the district, was not qualified to provide or supervise the provision of special education services, and was not knowledgeable about the general education curriculum.

36. Ms. Clause is a general education teacher who became the Principal at Keegan. She is also a founder of Keegan and is on its Board of Directors. She therefore was competent to supervise any and all staff at Keegan; there is no requirement that a school principal sitting as an administrative designee at an IEP meeting be a special educator. As Principal of Keegan, Ms. Clause was also able to commit Keegan resources as necessary to provide special education to students at the school. Ms. Clause was the representative who eventually contracted with TES to provide services to special education students at Keegan. (Factual Findings 45-87).

37. Ms. Clause, however, was not familiar with any services or programs available at other Temecula school sites. Even had she been familiar with them, Ms. Clause had no independent authority to commit any of Temecula's services. The Districts' failure to have a knowledgeable administrator with appropriate authority to offer programming and to commit funds at the IEP meetings was a procedural violation of Students' rights. (Factual Findings 45-87; Legal Conclusions 1, 11, 13-37.)

38. However, Students have failed to prove that this procedural violation did not amount to more than harmless error. At the time of Students' November 29, 2010, January 24, 2011, and February 3, 2011 IEP meetings, no member of Students' IEP teams had any thought that Students' programming needs could not be addressed at Keegan. Even though Keegan had not implemented Students' IEP's, Mother had no intention of asking that Students placement be anywhere other than at Keegan. She did not discuss or suggest anything along those lines at any of the IEP meetings in question. Mother had every intention of maintaining Students at Keegan. Nor did any other IEP team member contemplate or discuss at the time changing Students' placement. Therefore, the absence of anyone from Temecula who was knowledgeable about Temecula's programs and authorized to offer them, neither caused a loss of educational opportunity for Students or impeded Mother's ability to participate in Students' IEP process. There was no violation of Students' rights. (Factual Findings 45-87; Legal Conclusions 1, 11, 13-38.)

*Issue 1(c): Failure to offer an appropriate IEP at the IEP meetings convened on November 29, 2010, and February 3, 2011, and in the May 25, 2011 IEP amendment, because those IEP's did not contain appropriate goals, an appropriate program or services, and an appropriate ESY program.*

39. Students contend that the IEP's identified here failed to provide them with a FAPE. The Districts argue that the IEP's were reasonably calculated to provide Students with meaningful benefit.

40. Students' IEP teams on November 29, 2010, the date of their annual IEP meetings, did not have access to Students' IEP's from December 2009. Because the current IEP's had been misplaced and no one at Keegan thought to request them from Mother, the most current information Keegan had for Students was in their December 2008 IEP's, which were two years old at the time. The Keegan IEP team members did not think to contact Students' former teachers for information or to request another copy of the current IEP's. They did not consider asking Mother to provide a copy to them. And, they did not think to perform assessments of Students to obtain current information about Students' present levels of performance. Rather, Ms. Tappan and Ms. Garcia merely copied the present levels of performance stated on Students' December 2008 IEP's and used those levels as a basis to develop Students' November 29 annual IEP's. They provided no baselines for the goals they wrote for the new IEP's. Ms. Tappan and Ms. Garcia reduced Students' SAI services from 1200 minutes a week to 270 minutes a week. They also reduced the amount of OT and SL services to be provided to Students. At hearing, neither Ms. Tappan nor Ms. Clause could explain the basis for these IEP team decisions. Nor could they explain why Students' goals

were reduced, or on what basis the new goals were written. The IEP's they developed for Students' on November 29, 2010 were either based on old, outdated information or based on capricious decisions that the Districts could not justify at hearing. There was no basis for the stated present levels, no basis for the goals developed, and no basis for the significant decrease in SAI minutes or related service minutes for fourth grade students who were functioning at a Kindergarten level at best.

41. The decrease in services is all the more perplexing given the information that Students' IEP teams *did* have on November 29, 2010: evidence that Students, who were in fourth grade, were reading at levels and doing mathematics at levels commensurate with Kindergarten or first grade children, evidence that the boys had articulation difficulties, and evidence that they suffered from significant expressive and receptive language delays. This should have been readily apparent to Ms. Tappan and Ms. Garcia merely from reviewing the 18 goals developed for Students in their December 2008 IEP's. (Findings of Fact 1-40, 69-87.)

42. The totality of the evidence demonstrated that Students have extreme deficits in all areas of functioning and that they required intensive SAI instruction and related services to address those deficits. Keegan IEP team members ignored Students' deficits and proposed IEP's that did not approach the levels of service Students required. All of Students' witnesses, including Dr. Weckerly, Ms. Hardy-Lukes, and TES teacher Gina Bates agreed that Students' need could not be met under the service model offered in their November 29, 2010 IEP's. The Districts provided no documentary or testimonial evidence that contradicts the evidence presented by Students. (Factual Findings 1-40, 69-87, 139-168.)

43. There was no reason that Keegan could not provide Students with more SAI minutes. Keegan's charter did not prevent it from doing so. No agreement with Temecula prevented them from doing so. No agreement with TES prevented them from doing so. No state law prevented them from doing so. Keegan simply believed that as a charter school it was not required to provide a program a student needed if it was outside the educational model contemplated in its charter. Students have therefore met their burden of persuasion that the IEP's developed for them by Keegan during the 2010-2011 school year failed to contain appropriate present levels of performance, failed to provide adequate goals, and failed to offer Student an special education instruction and related services that would provide them with meaningful educational benefit. Rather than being objectively reasonably calculated to provide Students with a FAPE, their IEP's were developed without thought to Student's present levels of performance, the goals they needed in order to address their deficits, or the instruction and related services they needed in order to permit them to progress in the curriculum. By failing to provide Students with appropriate IEP's, the Districts denied Students a FAPE. (Factual Findings 1-40, 69-87, 139-168; Legal Conclusions 1-10, 12-14, 18-23, 39-43.)

44. Students also contend that the ESY provided to them in summer 2011 was inadequate to meet their needs.

45. In addition to special education instruction and services during the regular school year, ESY services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, Title 5, section 3043, provides that ESY services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. ESY is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) Students to whom ESY services must be offered under section 3043 “. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also *Hellgate, supra*, 541 F.3d at pp. 1209-1210.) A school district may not unilaterally limit the type, amount, or duration of ESY services. (34 C.F.R. §300.106(a)(3)(ii).)

46. Students’ previous IEP’s had provided them with ESY during Temecula’s traditional ESY session, which lasts about four weeks. Students’ November 29, 2010 IEP’s originally indicated Students’ would receive similar ESY at Keegan. Keegan, however, did not have an ESY program. Students’ special education instructor Gina Bates, cued by Ms. Clause, therefore suggested amending Students’ IEP’s to provide for intensive small group instruction for Students for 20 hours during the summer. Mother agreed to the amendment, and Ms. Bates provided the ESY services as scheduled. (Factual Findings 84, 113-116.)

47. However, Students failed to provide persuasive evidence that even had Students received four weeks of ESY instruction, they would have progressed. Mother enrolled Students in a Lindamood-Bell program over the summer that provided them with six hours a day of one on one intensive reading intervention over a four-week period. Students each received a total of 114 hours of instruction. In spite of this intervention, Students did not make any significant strides over the summer. When they returned to Keegan in the fall, Ms. Bates was required to spend several weeks re-teaching the material. Certainly, the more hours of instruction Students receive and the fewer breaks they have, the more information they may retain. However, the Districts were not required to maximize Students’ potential over the summer. Keegan provided them with 20 weeks of intensive services. Students’ evidence does not support a finding that Keegan was legally required to provide more. (Factual Findings 84, 113-116; Legal Conclusions 1-10, 12-14, 18-23, 45-47.)

*Issue 1(d): Deleting speech and language and occupational therapy services for extended school year (ESY) 2011 on May 25, 2011, without convening an IEP meeting;*

48. Students contend that it was improper for Keegan to delete their SL and OT services for the summer without holding an IEP meeting to discuss the changes.

49. The IDEA and corresponding federal regulations permit IEP teams to amend a student's IEP without the formality of a meeting if a student's parents agree to waive the meeting. (20 U.S.C. § 1414(d)(3)(D); 34 C.F.R. § 300.324(a)(4).)

50. Mother told Ms. Bates that she had requested that OT and SL services be deleted from Students' ESY programs because she wanted Students to "have a summer;" that is, she wanted them to have a break from school work. Unbeknownst to Keegan staff, Mother had also enrolled Students in LMB for the summer and ESY instruction might have conflicted with that. Keegan acceded to Mother's request and amended Students' IEP's in late May 2011. Mother agreed to waive the IEP meeting to address the amendment. Keegan prepared an IEP amendment and presented it to Mother. The document is checked off that Mother waived the IEP meeting. Mother signed the amendment.

51. Since Mother agreed to waive a formal IEP meeting, agreed to the changes, and was presented with a written IEP amendment, which she signed, the Districts met all requirements for amending Students' IEP's outside of an IEP meeting. There was no violation of Students' rights in this regard. (Factual Findings 84, 113-116; Legal Conclusions 1-10, 48-51.)

*Issue 1(e): Failing to materially implement the November 29, 2010, and February 3, 2011 IEP's in the areas of specialized academic instruction, speech and language, and occupational therapy*

52. As stated above, Keegan developed annual IEP's for Students on November 29, 2010, as amended on February 3, 2011. However, in spite of the fact that Keegan made specific offers of programming and services to Students, Keegan was unable to implement even the reduced services it had proposed. Although Keegan had contracted with TES in approximately October 2011, TES was unable to hire qualified staff to provide any of the services at Keegan until approximately February, 2011. Students missed another six weeks, more or less, of special education and related services due to the lack of personnel to provide the services and work on Students' goals.

53. The parties in this case have spent an extraordinary amount of time combing through Students' records from TES to determine the exact amount of hours that were provided pursuant to Students' IEP's once TES placed staff at Keegan, and to determine the exact amount of compensatory hours Students received based on TES's calculations. In spite of several continuances to permit them to resolve their disagreements over these hours, the parties were unable to do so. However, they all miss the point. It is not imperative to determine the exact hours because, as stated above, it is a material failure to implement that



is actionable, not minor discrepancies in the provision of services. In this case, Keegan failed to implement the very IEP's it had developed for Students, totally depriving Students of services for at least another six weeks. The evidence also indicated that Students' OT and SL services ceased in approximately April 2011 because TES staff was no longer available to provide the services. The scenario in this case is not a situation where a district has failed to provide a few of the therapy sessions required by an IEP. Here, it was an absolute failure to provide programming and services for extended periods. The failures were material. Students have met their burden of proof as to this issue. (Factual Findings 69-112; Legal Conclusions 1, 13-16, 18-23, 52-53.)

*Issue 2: Did Temecula and Keegan deny Students a FAPE during the 2011-2012 school year?*

*Issue 2(a): Failure to materially implement the November 29, 2010 IEP's as amended on February 3, 2011, and the goals and services consented to by parents in Students' December 5, 2011 IEP's, as amended on December 14, 2011;*

54. Students enrolled in Keegan for fifth grade in the fall of 2011. Their special education program was still dictated by the terms of their November 29, 2010 IEP's. For reasons not clarified at hearing, Keegan failed to provide Students with approximately one-third of the SAI hours they were supposed to receive. Students did receive almost all their speech and language hours. Students failed to demonstrate through any persuasive evidence that Keegan failed to implement their goals during this period of time. (Factual Findings 69-87, 131-132, 1388; Legal Conclusions 1-10, 12-14, 18-23, 52-55.)

55. A failure to provide one third of a student's services constitutes a material failure of implementation and therefore denied Students a FAPE. (Factual Findings 69-87, 131-132, 138; Legal Conclusions 1-10, 12-14, 52-55.)

*Issues 2(b) and 2(c): Failing to provide appropriate specialized academic instruction and failing to provide appropriate related services in speech and language and occupational therapy;*

56. This Decision has already found that Keegan failed to offer Students a FAPE in their November 29, 2010 IEP's because the level of services did not meet their needs. The IEP's covered a year of time. Students were therefore deprived of a FAPE from November 29, 2010, through the date of their next annual IEP's. Students allege that the Districts' offers the following year in Students' December 5, 2011 triennial IEP's were similarly deficient. (Factual Findings 1-40, 69-87, 139-168; Legal Conclusions 1-10, 12-14, 18-23, 39-43, 56.)

57. As discussed above, Ms. Bates had become increasingly alarmed at Students' failure to progress. She was concerned that the 270 minutes a week of SAI provided by the November 29 IEP's was insufficient, particularly once all compensatory hours TES had calculated for Students were accomplished. Ms. Bates expressed her concerns to Ms.

Tappan, to Ms. Clause, to Temecula Assistant Director for Special Education Ms. Hertig, and eventually to Mother. The Districts decided to wait to address Students' lack of progress until the Districts could complete Students' triennial assessments. All but the OT assessment were completed in time for Students' triennial IEP meetings on December 5, 2011. (Factual Findings 131-138).

58. As had been demonstrated on all previous assessments of Students, the Districts' assessments in fall 2011 indicated that Students not only continued to suffer substantial deficits in reading, writing, math, and language skills, but that they had, in fact, not made more than minimal progress since their last triennial assessments. Students' goals on their November 29 IEP's had been duplicates of their goals from their December 2008 IEP's. In December 2011, three years after the goals had originally been written Students had only partially met three of them and had failed to make progress on six. This was undeniable evidence that the special academic instruction and speech and language services provided by Keegan had failed to permit Students to make more than de minimus progress. (Factual Findings 131-138.)

59. Based on the evidence of Students' lack of progress, Keegan and Temecula finally concluded that Students needed more services than those offered in the prior year's IEP's. At the IEP team meetings on December 5, 2011, Ms. Hertig represented Temecula and attended the meeting as the LEA designee. Based on the accumulation of information regarding Students, the Districts jointly offered Students full time placement in an SDC on a Temecula school site. (Factual Findings 169-199.)

60. Students contend that placement in an SDC at a Temecula elementary school would not offer them a FAPE. They offer as support the testimony of Dr. Weckerly, Ms. Hardy-Lukes and Mr. Mayo, each of whom testified as expert witnesses for Students, and each of whom described the type of placement that would be optimal for Students: a small classroom with a high adult to student ratio; a program that imbeds language instruction and practice in the classroom curriculum and activities; slow paced instruction with frequent breaks and repetition of lessons; and intensive speech and language therapy. Based upon these recommendations, Students extrapolate that the SDC offered by Temecula failed to offer them a FAPE. (Factual Findings 169-199.)

61. There are two deficiencies in Students' arguments. First and foremost, Students failed to present any evidence whatsoever regarding Temecula's SDC programs at its elementary school sites. Dr. Weckerly, Ms. Hardy-Lukes, and Mr. Mayo were not asked to observe the SDC either as part of an assessment or in preparation for hearing. None of these professionals was independently familiar with Temecula's SDC programs. They therefore could not testify why the SDC would not have met Students' needs. Since this case was filed by Students, it was their burden to demonstrate that the Districts' program would not offer them a FAPE and *not* the Districts' burden to prove that the placement *was* appropriate. The only evidence offered as to the SDC programs at Temecula elementary schools was by Ms. Hertig. She testified that she believed a general SDC at Temecula was appropriate because the class sizes were small, there was a small student to teacher ratio with

one special education teacher and one or two aides assigned to each classroom, that the SDC's provided a language-rich environment, and because they could implement Students' IEP's. Because Students presented no evidence, they failed to meet their burden of persuasion that a Districts' SDC at one of its elementary school sites could not provide Students with the ability to meaningfully progress toward meeting their goals. (Factual Findings 169-199; Legal Conclusions 1-10, 12, 18-23, 56-61.)

62. Additionally, while Students' expert witnesses described programs that would maximize Students' potential, under *Rowley* the Districts' were not required to offer a program that did more than provide Students with a basic floor of opportunity that would permit them obtain meaningful educational benefit. Students therefore have failed to meet their burden of proof that placement at a Temecula SDC for the remainder of their fifth grade year would not provide them with a FAPE. (Factual Findings 169-199, 234-236, 238; Legal Conclusions 1-10, 12, 18-23, 56-62.)

63. With regard to speech and language services, the Districts' offer on December 5, 2011, increased Students' services to their prior levels of 50, one half hour therapy sessions a year. Ms. Hardy-Lukes testified that those amounts of services were inadequate to meet Students' needs because of their significant language deficits and demonstrated lack of progress. She recommended 90 minutes a week of individual and group services as the minimal amount appropriate to offer Students a chance to remediate their language deficiencies. (Factual Findings 169-199, 234-236, 238; Legal Conclusions 1-10, 12, 18-23, 56-63.)

64. The Districts did not present any evidence to rebut Ms. Hardy-Lukes' assessment results, or her conclusions about services required by Students. The Districts did not present the testimony of any speech and language pathologist who had assessed Students or provided services to them. Although Ms. Tappan is an SLP and did testify at hearing, she never provided services to Students and never assessed them. No one asked her at hearing to comment on Ms. Hardy-Lukes assessment, or to critique Ms. Hardy-Lukes' conclusions and recommendations. Therefore, there was no evidence to contradict Students' contention, supported by Ms. Hardy-Lukes assessment and testimony at hearing, that the Districts' offers of speech and language services were insufficient to meet Students' needs and to help them benefit from their special education. Students have therefore met their burden of proof that the Districts failed to provide them with adequate speech and language therapy services from the time Students enrolled at Keegan, to their May 30, 2011 IEP meetings, when the Districts increased their offer of services to 90 minutes a week per the recommendations of Ms. Hardy-Lukes. (Factual Findings 169-199, 206-260; Legal Conclusions 1-10, 12, 18-23, 56-64.)

*Issue 2(d): Failure to timely offer or implement a program for ESY 2012*

65. The Districts' December 5, 2011 IEP offers to Students did not include provision for ESY instruction or services for summer 2012. There is no logical basis for this failure. As stated above in Legal Conclusion 45 above, ESY is appropriate for a child who

has a handicap likely to continue for prolonged periods and where regression will be likely during interruptions in the child's educational programming. Given Students' highly impacted educational profile, ESY should have been offered to them.

66. The Districts realized that since Students' parents had not fully agreed to the December 5, 2011 IEP's, there were portions of Students' previous IEP's that were still in effect, including the provisions of ESY services. Belatedly realizing this, Ms. Hertig contacted Mother to offer Students' placement in a Temecula SDC for summer. However, by the time Ms. Hertig made the offer for ESY, two things had occurred. First, Parents had contacted Newbridge, the nonpublic school recommended by Dr. Weckerly, to see if Students could be accepted for the Newbridge ESY program, which was scheduled to start on July 2, 2011, one school day after Ms. Hertig contacted Mother. By July 2, Newbridge had already accepted Students for a one-week probationary period starting that day. The Districts emphasize that Parents never gave them advance notice of Parents intent to privately place Students for the summer. However, the Districts' protestation is unpersuasive. As discussed below, parents are required to give notice to a school district of their intent to privately place a child after *rejecting* a district offer. In this case, no offer had for ESY had been made to Students at the time Parents enrolled them in the Newbridge ESY program. There was thus no offer for parents to reject.

67. Additionally, the Districts, through Temecula, only made a partial ESY offer to Students. By the time Ms. Hertig contacted Mother, the Temecula ESY had already been in session for almost two weeks. Temecula expected Students to start attending a program halfway through the session. The Districts explain that they were only required to offer Students two weeks of ESY per the amendment to their November 29, 2010 IEP's. However, this argument is not persuasive. Either the Districts were required to offer Students ESY as it was designed at Temecula, or they were required to offer a different program that could meet Students' needs, as they did with the intensive SAI ESY services provided during ESY 2011. Belatedly offering half a program and requiring Students to join a program already in session denied Students an ESY program which they required in order to receive a FAPE. Students have met their burden of proof on this issue. (Factual Findings 196, 261-274; Legal Conclusions 1-10, 18-23, 45-46, 65-67.)

*Issue 2(e): Failing to timely convene an IEP team meeting to review Students' occupational therapy assessment*

68. As stated above, Students did not provide any evidence relative to their alleged denials of FAPE based upon inadequate occupational therapy services or other issues relating to occupational therapy. No occupational therapist testified at hearing and none of Students' OT assessments were moved into evidence. The ALJ therefore has deemed all issues related to OT to have been abandoned. Students therefore did not meet their burden of proof as to this issue. (Factual Findings 112; Legal Conclusions 1.)

*Issue 2(f): Failure to develop appropriate goals and services to address all of Students' unique needs*

69. This issue is a duplicate of issues 2(b) and 2(c). In accord with the determinations of those issues, Students met their burden of persuasion that the Districts did not provide them with appropriate SAI services or appropriate speech and language services during the first months of the 2011-2012 school year, up to December 5, 2011. The Districts failed to develop appropriate goals and offer appropriate services in Students' November 29, 2010 IEP's, denying Students a FAPE up to December 5, 2011. However, as stated above, Students have failed to meet their burden of proof that their December 5, 2011 IEP's were similarly deficient. (Factual Findings 169-199, 234-236, 238; Legal Conclusions 1-10, 12, 13-14, 18-23, 39-43, 56-69.)

*Issue 2(g): Failure to make a specific offer of placement*

70. A school district is required to make a "formal, specific offer" of placement and services in writing, even if the district believes that a child's parents have no intention of accepting that offer. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*); see also *Glendale Unified School District v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093). In *Union*, the court described the reasons for requiring a formal, specific offer in writing:

The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in 'presenting complaints with respect to any matter relating to the...educational placement of the child.'"

(*Union, supra*, 15 F.3d at p. 1526.)

71. Students argued at hearing that the Districts' broad reference to placement in a "SDC" in their December 5, 2011 IEP's failed to comport with the specificity required by *Union* because the Districts did not identify the type of SDC being offered or the school site where the SDC was located.

72. Students' arguments are unpersuasive. Ms. Hertig explained that Temecula elementary schools have only three types of SDC's: autistic specific classrooms and severely handicapped classrooms that would have been identified on Students' IEP's had they been offered, which they were not, and the general SDC classroom that was offered to Students. Ms. Hertig explained that Temecula does not presently identify SDC's as "mild to moderate" or "moderate to severe." Therefore, the Districts' reference to "SDC" did describe a specific type of placement. (Factual Findings 192-196.)

73. Students' contention that the IEP offer should have specified a school site is equally unavailing. An educational placement is that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042, subd. (a).) There is no requirement that a specific district school site be identified. As stated in the comments to the 2006 Code of Federal Regulations, the United States Department of Education historical position has been that "placement" refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school. (71 Fed. Reg. 46687 (August 14, 2006).) Students have therefore not met their burden of proof that the Districts' designation of "SDC" to identify the placement they proposed for Students failed to meet the standard for specificity required by *Union*. (Factual Findings 192-195,197; Legal Conclusions 1-10, 18-23, 70-73.)

*Issue 2(h): Failure to include an appropriate LEA representative at the IEP meeting held May 30, 2012.*

74. As stated above in Legal Conclusion 28, IEP teams must include certain required participants. One of those persons is a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum. Students contend that the Districts failed to have an appropriate LEA administrative designee at their joint May 30, 2012 IEP meeting. Students contend that this failure caused them to lose educational benefited and impeded Mother's ability to participate in the IEP process.

75. Mother requested the meeting to discuss the results of Dr. Weckerly's and Ms. Hardy-Lukes' independent assessments. Mother also wanted to discuss placement options based on the findings and recommendations made in the IEE's.

76. Melanie Hertig, Temecula Assistant Director for Special Education originally had been invited to attend the meeting as the LEA designee. She had been the LEA designee at Students' December 5, 2011 IEP meetings, when Temecula had offered Students placement in a Temecula SDC. At the last minute, Ms. Hertig had a conflict and could not attend. No representative from Temecula appeared in her place.

77. The IEP team reviewed Dr. Weckerly's psycho-educational assessment and recommendations and Ms. Hardy-Lukes' speech and language assessment and recommendations. Dr. Weckerly had recommended placement at Newbridge. Although the IEP team at the May 30 meeting wanted to discuss potential alternative placements to the SDC offered by Temecula, it was unable to do so. No Temecula representative attended the meeting to describe or offer any alternative placements that might have been available at Temecula. The Keegan team members informed Parents that they could not offer placement and services outside of Keegan.

78. The absence of a Temecula representative at this meeting was particularly egregious because, had Parents accepted a Temecula placement, Students would have transitioned to middle school. Ms. Hertig acknowledged during her testimony that the general SDC classes at Temecula middle schools consisted of 12 to 18 students. Ms. Hertig acknowledged that had she attended the May 30 IEP meeting, she would not have recommended Students be placed in a general SDC at the middle school level. Rather, she would have recommended that they be placed in one of Temecula's bridge programs, an SDC program for special education students in sixth grade who would benefit from a program that was somewhere between a general SDC and a severely handicapped SDC. At hearing, Ms. Hertig explained that the bridge SDC's generally have no more than nine students, with three to four adults in the classroom, giving the classes a very small student to adult ratio. (Factual Findings 192-195, 197, 251-260.)

79. Because no representative from Temecula attended the May 30 IEP meeting, there was no one who was familiar with Temecula's bridge program, or any of the other programs that might have been available to offer to Students, and there was no one present who had the authority to offer alternative Temecula placements. Students have therefore demonstrated that Mother's right to participate in the IEP process was impeded the continuum of placement options could not be discussed or offered. Students have also demonstrated that they lost educational benefit because a potentially appropriate public school program was never offered to them. The Districts' failure to have an appropriate LEA representative at the May 30, 2012 IEP meeting therefore denied Students a FAPE. (Factual Findings 192-195, 197, 251-260; Legal Conclusions 1-10, 18-23, 28-29, 74-79.)

*Issue 3: Did Temecula and Keegan deny Students a FAPE for the 2012-2013 school year?*

*Issue 3(a): Failure to make an appropriate offer of placement*

80. Still to be addressed is the Districts' offer of placement in an SDC for the fall semester of the 2012-2013 school year. Students' December 5, 2011 IEP's covered a year period of time from December 5, 2011, to December 5, 2012. This basically encompassed the second half of fifth grade for Students as well as the first half of sixth grade. Temecula elementary schools only serve students through fifth grade. They then promote to middle school for sixth grade.

81. None of Students' witnesses, including Mother, had observed the SDC placements either at the elementary school level or at the middle school level. However, Districts' witness Melanie Hertig readily acknowledged that the general SDC placements, while appropriate for Students in elementary school, would not be appropriate for them at the middle school level. This is due to the difference in composition of the classes. According to Ms. Hertig, the elementary programs have classrooms with fewer students and the environment is more language rich, with language imbedded in the curriculum. At the middle school level, the SDC classes have from 12 to 18 students and language is not nearly integrated as much in the classroom structure.

82. Ms Hertig testified that Temecula has what they call a “bridge” program for some sixth grade special education students. This program is more structured and restrictive than the general SDC classes but less so than the SDC’s for severely handicapped students. Ms. Hertig stated that she felt the bridge program rather than the general SDC program, would have been appropriate for Students had they returned to a Temecula school. However, as discussed below, this program was never offered to Students because Ms. Hertig did not attend Students’ May 30, 2011 IEP meeting. The Keegan and TES staff members at the IEP meeting were not familiar with the bridge program and, in any case, were not authorized by Temecula to offer it to Students.

83. Students have therefore demonstrated that the general SDC class would not have offered them a FAPE for sixth grade, beginning with the fall 2012 semester. (Factual Findings 1-40, 139-168, 206-250, 265, 286-287; Legal Conclusions 1-10, 12, 18-23,80-83.)

*Issue 3(b): Failure to have an IEP in place by the start of the 2012-2013 school year.*

84. Students’ argument regarding this issue is unpersuasive. As stated above, the Districts’ IEP offers of December 5, 2011, offered Students a placement and services for a year, ending December 5, 2012. The fact that Students had not accepted the offer in full did not mean that the Districts had failed to make the offer. Additionally, because Students had not accepted the SDC placement offered on December 5, their placement at Keegan as stated on their November 29, 2010 IEP’s constitutes stay put for them. Their IEP’s at the start of the 2012-2013 school year therefore consisted of a combination of the placement at Keegan from their November 2010 IEP, and the goals and services Parents had accepted from the December 5, 2011 IEP’s, as amended. The Districts therefore did not fail to have IEP’s in place for Students at the start of the 2012-2013 school year. There was no violation of FAPE. (Factual Findings 169-205, 251-260; Legal Conclusions 1-10, 12,18-23, 84.)

*The Appropriate Remedy for the Districts’ Denial of FAPE*

85. Parents may be entitled to reimbursement for placing a student in a private school without the agreement of the school district if the parents prove at a due process hearing that: 1) the District had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c) (2006); Ed. Code, § 56175; see also *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*) (reimbursement for unilateral placement may be awarded under the IDEA when the District’s proposed placement does not provide a FAPE.)

86. To be appropriate, the parent’s private placement does not have to meet the standards of a public school offer of FAPE. (Ed. Code, §§ 56175, 56176; 34 C.F.R. § 300.148(c) (2006).) It must, however, address the student’s needs and provide educational benefit to the student. (See *W.G. v. Board of Trustees of Target Range School District*, *supra*, 960 F.2d at p. 1487.) The Ninth Circuit recently clarified that a private placement need not furnish “every special service necessary to maximize [a] child’s potential.” (*C.B. v.*



*Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, 1159.) Instead, the private placement must provide “educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to benefit from instruction.” (*Ibid.*)

87. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496. (*Puyallup*) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

88. Once a significant denial of a FAPE has been established, it is a rare case in which an award of compensatory education is not appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) The authority to order such relief extends to hearing officers. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230, [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].) An award of reimbursement may be reduced if warranted by an analysis of the equities of the case. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1498.)

89. As detailed above in Factual Findings 1-287 and Legal Conclusions 1-84, Students have met their burden of proof that the Districts’ committed several procedural and substantive violations of Students’ rights under the IDEA, which resulted in a denial of FAPE to Students. They have proven that the Districts materially failed to implement their IEP’s, failed to have appropriate IEP team members at some of Students’ IEP meetings, failed to provide appropriate special education and related services to Students and failed to offer an appropriate placement for middle school, and failed to provide all necessary ESY services. Under the facts of this case, the equities weigh heavily in favor of awarding a remedy for the Districts’ failures to provide a FAPE to Students for much of the time they attended Keegan.

90. As remedies for these violations, Students request that their parents be reimbursed for their out of pocket costs for the following services they funded for Students: speech and language services from the Temecula Valley Therapy Services Agency; tuition paid thus far to Newbridge for ESY 2012 and school year 2012-2013 as well as mileage reimbursement; tuition paid to Lindamood-Bell for ESY 2011 and mileage reimbursement for transportation to the LMB offices. Students also request compensatory education in the form of prospective placement at Newbridge’s Cooning Center for the remainder of the 2012-2013 school year as well as reimbursement for future transportation costs.

91. The Districts offer several reasons why Students are not entitled to the remedies requested. They first assert that they provided a FAPE to Students throughout the two school years in question in this case. This Decision finds otherwise, as detailed above, for much of the time period at issue.

92. The Districts next argue that Parents cannot obtain a remedy based on a harm that they caused in the first place. The Districts' position is that Parents refused the IEP offers the Districts made to Students on December 5, 2011. The Districts therefore were legally required to continue implementing Students' previous IEP's. The ALJ has indeed found that Students failed to prove that the Districts' December 5 offer of placement and services was legally inadequate. This Decision finds that Students have failed to prove all issues they raised in their complaints. In fashioning her remedies, the ALJ will take into account the fact that Students have not prevailed on all their allegations.

93. The Districts contend that Students failed to prove that the private services and private school placement chosen by Parents is appropriate. The Districts therefore contend that the ALJ should deny reimbursement or compensatory education based upon the private placements. However, as discussed above, the ALJ has found that the Cooning Center program at Newbridge is appropriate. There is no dispute that Newbridge is a certified non-public school. It provides small class size, a language-rich class environment with imbedded SLP support, related services, and additional aide support across environments. The testimony of Dr. Weckerly and Mr. Mayo regarding the program and the benefits Students can gain from it was not controverted by any of the Districts' witnesses. Because the Districts failed to offer an appropriate program to Students for school year 2012-2013, Parents had no recourse but to seek out a program that would meet their needs. The evidence supports a finding that the Cooning Center provides an appropriate academic program for Students along with suitable related services that will allow them to gain meaningful academic benefit. Students have proven that the Districts denied them a FAPE in several regards over the course of two years. The IEP's developed by the Districts for Students on December 5, 2011 indicate that Students had failed to meet any of their goals and had only partially met three of them. Balancing the equities, including the issues on which Districts prevailed, the ALJ finds that it appropriate to award Students compensatory education in the form of one full year's tuition at the Cooning Center at Newbridge, which shall consist of reimbursement to parents for all tuition costs to date for the 2012-2013 school year for both Students as well as reimbursement to Parents for the cost of tuition from the date of this Decision to the end of the 2012-2013 school year, including ESY 2013. (Factual Findings 1-287; Legal Conclusions 1-93).

94. The Districts also argue that Parents did not provide appropriate notice of their intent to seek reimbursement when they privately placed Students at Newbridge, first for ESY 2012 and later for school year 2012-2013. As discussed above, with regard to ESY 2012, the Districts had not offered Students a summer program at the time Parents sought placement at Newbridge. Given that Parents were not withdrawing Students for a District program in favor of a private placement, there was no notice to give. Since the Districts timely failed to offer Students an ESY program for summer 2012, the equities in this case

balance in favor of ordering the Districts to reimburse Parents for the cost of Students' tuition at Newbridge for summer 2012, along with related reimbursement for transportation costs.

95. With regard to the unilateral private placement for school year 2012-2013, the Districts argue that Parents did not give 10 business days' notice of the placement. The Districts argue that Parents did not give the reasoning behind their disagreement with the Districts placement. However, even assuming that the notice provided by Parents did not follow exact statutory requirements, equity mediates in favor of awarding a remedy to Students for the failures of the Districts to provide them with a FAPE during significant portions of the two years at issue in this case.

96. The Districts additionally argue that reimbursement for Students' tuition at LMB is not warranted because Students did not prove the placement was appropriate. The ALJ agrees with the Districts' position with regard to the LMB services. Parents never gave any indication in the two school years that Students' attended Keegan that they were unhappy with Students' progress in reading at school, that they believed that the reading instruction Students received from TES staff was inadequate and did not address their needs, or that they believed that Students required a different reading instruction methodology. The only disagreement Mother brought to the Districts' attention was that she wished them to provide an increased amount of SAI minutes per week. Parents never asked the Districts for additional services, never requested that the Districts fund LMB or provide an equivalent reading program during the summer. Although Mother informed Ms. Clause that she intended to have Students assessed by LMB, she never informed her that she was placing the Students there, and never gave notice that she intended to request reimbursement for the cost of the LMB tuition. Mother therefore deprived the Districts of an opportunity to address any concerns she had about Students' progress in reading or to offer to provide Students' with additional reading instruction through a District program or instructor or provider of the Districts' choice.

97. Additionally, there is very little evidence that the LMB program provided any noticeable benefit to Students. Their test scores following the four weeks of instruction show little improvement. Ms. Bates found little improvement when Students returned to Keegan in the fall. Most significant is the fact that it is impossible to determine what the source was of any improvement that did occur. LMB first tested Students on April 6, 2011. They received two months of SAI instruction and an additional 20 hours of intensive SAI instruction for ESY from Ms. Bates prior to beginning the LMB classes. Finally, Mr. Mayo testified that when Students began attending Newbridge in the fall of 2012, they were reading somewhere at a pre-primer to Kindergarten level, indicating absolutely no progress, and even demonstrating regression, from their assessments in 2008. To award Parents reimbursement for LMB would amount to a punitive measure against the Districts rather than constitute reimbursement for services required by Students but not provided by the Districts. For these reasons, Students' request for LMB reimbursement is denied. (Factual Findings 117-130; Legal Conclusions 85-97.)

98. With regard to reimbursement for SL therapy provided by Ms. Hardy-Lukes, the Districts assert that Students have failed to prove that her services were appropriate particularly since she testified that the at least a portion of the therapy is medically based. The evidence supports the Districts' contention in this regard. Remedial awards in special education cases are equitably based. In this case, Students have prevailed fully only on six of the issues they raised, have partially prevailed on seven issues, and failed to prevail totally on three issues. The ALJ is awarding Students' requested remedies of payment for tuition at Newbridge for ESY 2012, and a full year at Newbridge for school year 2012-2013, along with corresponding payment for mileage costs to Newbridge. This amounts to four of Students' seven requested remedies. Balancing the equities, in light of the fact that the Districts prevailed fully on three issues and partially on seven, it would be inappropriate to award Students all their requested remedies. With regard to speech and language services, those are encompassed in the Newbridge Cooning Center program. Placement at Cooning for ESY 2011 and school year 2012-2013 is therefore appropriate compensatory education for losses suffered due to the Districts' failure to provide them with adequate speech and language services during part of the time they were at Keegan. For these reasons, Students' request for reimbursement for speech and language services from Temecula Valley Therapy Services is denied. (Factual Findings 250, Legal Conclusions 85-98.)

99. Finally, Students request that their parents be reimbursed for transportation costs to Newbridge and to LMB. Since the ALJ has denied the request for reimbursement for LMB tuition, the related transportation expenses is also denied. The ALJ is awarding tuition at Newbridge's Cooning Center as compensatory education for Students. Parents are also entitled to reimbursement for past and future transportation costs to that school. Mother acknowledged at hearing that she is carpooling with another family to Newbridge and therefore only drives one round-trip a day. Pursuant to Students' request for reimbursement for transportation to Newbridge for school year 2012-2013, reimbursement will be limited to one round-trip a day. ( Legal Conclusions 85-99.)

## ORDER

1. Within 60 days of this Decision, the Districts shall reimburse Students' parents in the amount of \$ 3,500.00 for Students' tuition at Newbridge for ESY 2012, and \$3,114.22 for the cost of mileage in transporting Students to and from Newbridge for ESY 2012, for a total of \$6,614.22 as reimbursement for ESY 2012 at Newbridge.

2. Within 60 days of this Decision, the Districts shall reimburse Students' parents in the amount of \$9,600.00 for tuition already paid by Parents for Students' placement at Newbridge, and \$1,946.39 as reimbursement for transportation mileage costs already incurred, for a total amount of \$15,146.39.

3. The Districts shall immediately begin funding Students' placement at the Cooning Center at Newbridge, including all tuition for the regular school year, extended school year 2013, and any costs associated with providing speech and language and

occupational therapy services to Students, for the remainder of the 2012-2013 school year. This placement is ordered as compensatory education for Students as a remedy for the Districts' denial of FAPE to Students. It is not intended as a prospective placement and shall not constitute Students' stay put placement in the event of future disputes between the parties. Students' stay put placement after ESY 2013 shall be the last executed and implemented IEP's for Students.

4. The Districts are also ordered to reimburse Parents for the cost of Students' tuition at Newbridge, and related mileage costs for one round-trip a day, from October 15, 2012, to the date of this Decision. Therefore, within 30 days of this Decision, Parents shall provide the Districts with copies of invoices from Newbridge indicating tuition paid by Parents, along with copies of credit card statements or cancelled checks supporting the payments. Parents shall also submit their mileage reimbursement claim for the period October 15, 2012, to the date of this Decision. The Districts shall reimburse Parents for the costs of tuition and mileage within 60 days of receipt of the paperwork described in this paragraph the Order.

5. Parents are also awarded reimbursement for future mileage costs of one round-trip daily from their home to Newbridge for the remainder of school year 2012-2013 and ESY 2013, at whatever is the present rate of reimbursement for business travel under Internal Revenue Service regulations. Parents shall submit requests for reimbursement on a monthly basis to the Districts, including proof of Students' daily attendance at Newbridge, and mileage claimed. The Districts shall reimburse Parents for these transportation costs within 60 days of receiving Parents' request for reimbursement.

6. The Districts are not required to provide District transportation service to Students for their attendance at Newbridge.

7. All of Students' other requests for remedies are denied.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Students have fully prevailed on Issues 1(a), 1(e), 2(a), 2(d), 2(h), and 3(a). Students have partially prevailed on Issues 1(b), 1(c), 1(d), 2(b), 2(c), 2(f), and 3(a). The Districts likewise partially prevailed on Issues 1(b), 1(c), 1(d), 2(b), 2(c), 2(f), and 3(a). The Districts prevailed fully on Issues 2(e), 2(g), and 3(b).

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 28, 2013

/s/

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DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings